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A comparative study of the law relating to disposition and character evidence

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A COMPARATIVE STUDY OF THE LAW RELATING TO DISPOSITION AND CHARACTER EVIDENCE

BY

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CHAPTER 3

CHARACTER EVIDENCE

(1) STATEMENT OF THE RULE

The good or bad character of a party to a cause is generally a matter which is collateral to the main issue, (connected, but subordinate to the main issue) and evidence of it is accordingly in general inadmissible.[1] This is as true in Scotland as it is true in England, America, and the common law countries of the common-wealth. It should however, be noted that this general rule of exclusion, is subject to exceptions. What I wish to do just now, is to state the rules of admissibility with regard to character evidence, and also state the accompanying exceptions where such exist, with a view to enabling anyone to understand simply and straight away what the scope and limitations of admissibility of character evidence is. In later chapters, I will be discussing much more elaborately, the rules that might just have to be mentioned briefly here.

It is only in a relatively few cases that character of a party is directly in issue; in the great majority of cases, both civil and criminal, character is not itself in issue and must therefore be judged solely according to its probative value, if any, in relation to the fact in issue. When a person's general character is in issue, evidence may of course, be given of his general character, whether in civil or criminal proceedings. Thus in a nutshell, the rule is that, where character is not in issue, evidence of a good or bad character of a party in a civil or criminal proceeding is generally

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1) Walker and Walker - The Law of Evidence in Scotland, § 17; Dickson, Evidence (3rd ed.) § 6.

inadmissible; and on the other hand, where a person's character is in issue in a civil or criminal cause, evidence of his general character may be given; both rules are subject to exceptions which will shortly be discussed. I will like to draw attention to the fact that it is the character of the parties to the cause that the rules are concerned with and as such does not include the character of witnesses, victims or third parties. Suffice to say just now that, character of all witnesses who give evidence is relevant, (in both civil and criminal causes) and, they may be cross examined as to their credit. It should be noted that there are times when a party could be a witness, in such cases, the rule that applies as to witnesses generally becomes applicable, but it should be made clear that the position of the accused in criminal cases is special.

So starting off with civil cases, all evidence of character, good or bad is excluded. This rule of evidence is not doubted in America, England or Scotland, and it is also accepted in the common-wealth countries where some have enacted it into statute. Section 52 of the Indian Evidence Act[1] states: "In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant". This provision is contained word for word in section 66 of the Nigeria Evidence Act.[2] Perhaps the discussion of the rule may now devolve on a brief explanation and illustration of the above provision since it

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1) Indian Evidence Act, 1872
2) Nigeria Evidence Act, 1945

represents the generally accepted position. No attempt will be made to analyse and scrutinise the words of the provision, this and any further detailed discussion will have to wait till later.

So two things are clear. First, in civil cases where the character of a party is not in issue, character evidence is inadmissible for the purpose of proving or disproving any fact in issue in the case, because of its evidential irrelevance, and the rule applies to bad and good character alike. Thus, the defendant to a civil action of keeping false weights,[1] or for the impeachment of a will for fraud,[2] will not be allowed to assert his good character for the purpose of disproving the claim. And secondly, in a civil case where character of a party is in issue, or directly relevant to the determinaton of the facts in issue in the proceedings, evidence of character of the party is admissible. Thus, in a libel action, the question being whether a governess was "competent, ladylike and good-tempered", while in her employer's service, witnesses were allowed to assert or deny her general compentency, good manners and temper.[3] And where A sued an insurance company for loss sustained by a burglary, to which the defence was that the loss was caused by the dishonesty of B, - A's servant, evidence was received that B was an associate of burglars and had entered A's service by means of a forged character.[4]

In a more limited context, character will always be directly relevant to the measure of damages in defamation assuming that the issue of liability is determined in favour of the plaintiff. What is relevant here, however, is the reputation which the plaintiff may be

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1) Attorney-General V. Bowman (1791) 2 Bos. & P. 532 n.
2) Goodright, ex dem Faro V. Hicks (1789) Bull N.P. 296
3) Fountain V. Boodle, 3 Q.B. 5; See also Brime V. Bazalgette, 3 Ex. 692; King V. Waring, 5 Esp.14; Jones V. James, 18 L.T. 243.
4) Hurst V. Evans (1917) 1 K.B. 352.

taken as having enjoyed before publication of the defamatory matter, and the extent to which his reputation has been affected adversely by the defamation. Section 69 of the Nigeria Evidence Act provides: "In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant". This exact provision is contained in section 55 of the Indian Evidence Act.

The rule of evidence as to character in criminal cases, is very different from that of the civil proceedings. For instance, evidence of the accused good character is always admissible on his behalf in criminal courts, whereas as we have seen, same is not true for the defendant in civil cases. But while he is free to call evidence of his good character, evidence of his bad character would then become admissible in rebuttal. But in general, evidence that an accused person is of bad character is not admissible against him; the prosecution cannot make evidence of bad character of the accused part of its original case. Both of these rules, are clearly stated by Viscount Simon, L. C. in Stirland V. Director of Public Prosecution,[1] when he said: "The historical development of the English rule that the prosecution in seeking to prove the crime charged may not, generally speaking, introduce evidence as to the previous bad character of the accused, but that the accused may call evidence in support of his previous good reputation is difficult to trace..... By the end of the eighteenth century evidence of good character was constantly

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1) (1944) 2 All E.R. at p. 17; see also (1943) 30 Cr. App. R. 40 at 52-54.

admitted". A remarkable instance is provided by the trial of Arthur O'Connor[1] for high treason in (1798), - where Mr Erskine was one of a large number of distinguished persons who testified to the prisoner's character for loyalty. Erskine, indeed, in the course of his evidence (page 40) stated that with the choice before him of defending Mr O'Connor or of giving evidence as to his good character, he chose the latter and the Attorney General, Sir John Scott (page 113) told the jury that 'in all doubtful cases character ought to have very considerable weight indeed'. Cockburn C. J., in R V. Rowton[2] observes that 'although, logically speaking, it is quite clear that an antecedent bad character would form quite as reasonable a ground for the presumption and probability of guilt as previous good character lays the foundation for the presumption of innocence, yet the prosecution cannot go into evidence as to bad character. This allowing of evidence of a prisoner's good character to be given has grown up from a desire to administer this part of our law with mercy as far as possible. It has sprung up from the time when the law was according to the common estimation of mankind, severer than it should have been'. Section 67 of the Nigeria Evidence Act and section 53 of the Indian Evidence Act, both state what the common law rule says, that: "In criminal proceedings the fact that the person accused is of a good character is relevant".

As we have seen above, in criminal cases, evidence of an accused person's bad character cannot be ordinarily given in evidence against him,[3] even though it may seem an attractive proposition to say that

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1) (1798) 27 St. Tr. 31.
2) (1865) L & C. C.C.R., at p.530
3) R V. Long (1902) 5 C.C.C. 493 (Que. K.B.); R V. Doyle (1916) 26 C.C.C. 197 (N.S.S.C.); R V. McLaren (1935) 63 C.C.C. 257 (Alta. C.A.).

someone who has a bad reputation is a person likely to commit offences. As a matter of fact, some legal systems, as they obtain on the continent permit that line of reasoning which is quite inconsistent with the common law system of justice. However, whatever the courts on the continent may think, this common law rule is widely accepted. Section 54 of the Indian Evidence Act states that: "In criminal proceedings, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant". The Nigerian equivalent of this provision appears to state things more elaborately. Section 68 of the Evidence Act of Nigeria provides:

(1) Except as provided in this section, the fact that an accused person is of bad character is irrelevant in criminal proceedings.

(2) The fact that an accused person is of bad character is relevant:

(a) when the bad character of the accused person is a fact in issue;

(b) when the accused person has given evidence of his good character

(3) An accused person may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (d) of the proviso to section 159.[1]

In criminal cases there are a limited number of cases where character is itself in issue, (such cases may be described generally as execptions to the rule) and in such cases, this is almost always because some aspect of character is an essential element of the offence (hence in issue in the case) and so may be proved by evidence

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1) See equivalent provisions in Section 1 (f), Criminal Evidence Act 1898; s. 5 (2) Evidence Act, 1908 (New Zealand); ss. 413A & 413B of Crimes Act, 1900 - (New South Wales).

like any other fact in issue. In R V. Barsalou,[1] Wurtele, J., said: "One of these exceptions (ie, exceptions to the rule) is that when any act done by any person is either a fact in issue, or is relevant to the issue, any fact which supplies a motive for such act is relevant, and proof of it is admissible even if such fact should tend to affect and damage such person's good character: Stephen's Digest of the Law of Evidence, article 7. While the law does not allow evidence of general bad character to be adduced in the first instance as a criminative circumstance, whenever it is necessary to prove a motive on the part of the defendant to commit the offence charged, it is competent to prove particular facts which are of a nature to show a motive, even when they may injuriously affect his reputation, and the reason is that proof of the existence of a motive is not in itself a criminative circumstance but is only a circumstance which tends to remove the improbability of the act which has been proved to have been done having been done without criminal intent".

Quite often exceptions to the rule of inadmissibility of evidence of bad character in the first instance occur by virtue of statutory provisions[2] (most important of which have already been discussed under similar facts evidence), but there are some other important instances which are not statutory. For instance, in indictments for rape and other sexual offences of general immoral character of the prosecutrix is admissible.[3]

Other instances that qualify as an exception to the general rule includes where the character of places, things or animals is in

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1) (No 2) (1901) 4 C.C.C. 347 (Que. K.B.).
2) See s. 21 of the Firearms Act, 1968; s. 99 of The Road Traffic Act, 1972; s. 1 of The Street Evidence Act, 1959; s. 4 of The Vagrancy Act, 1824; s. 5 Prevention of Crimes Act, 1871; s. 27 (3) of The Theft Act, 1968.
3) Cf R V. Clarke (1817) 2 Starkie 241; R V. Jenkins (1945) 31 Cr. App. R. 1 - See post for further discussion.

issue. When the doings of animals are in issue, it is relevant to prove its general character,[1] or habits of the species, or of the particular animals as well as doings of the same, or similar animals on other occasions.[2] If it is material to show that at the time of an accident that a horse had the habit of shying, instances may be proved of such shying both before and after the time of the accident.[3] Thus the character of an animal is no less relevant than that of a human being as indicating its probable conduct on a particular occasion. Similarly, in prosecutions for keeping a bawdy-house,[4] or house of ill-fame[5] it is relevant to prove the character of the place. Also the character of the inmates is thought to be generally admissible too. However, in prosecutions for keeping a bawdy-house or house of ill-fame, or a place of resort for gambling, liquor selling or the like, it is often difficult to distinguish whether a question of Evidence or a question of Criminal Law is involved; and much will depend on the elements of the crime as determined by the wording of the statute, applicable and by its judicial construction. For example, if it distinctly appears in the statute that the repute of the house is the essential criminal fact, so that merely to keep a house of that reputation is the defence, then reputation is a fact in issue, and the reputation may be shown, irrespective of the actual character or use of the house.[6] But if the actual character or use of the house is also or alone an element of the crime, then the question of the use of reputation is an evidentiary

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1) See Maggi V. Cutts (1878) 123 Mass. 535 (viciousness of horse); Broderick V. Higginson (1897) 169 Mass. 482, 48 N.E. 269
2) See Wigmore, Evidence, § 201.
3) Todd v. Rowley 8 Allen (Mass.) 51; See Brown V. Eastern Counties Ry. 22 Q.B.D. 391;
4) Atkinson V. Powledge (1936) 123 Fla. 389, 167 So. 4; R V. Theirlynck (1931) 55 C.C.C. 126; R V. West (1950) 96 C.C.C. 349. 5) King V. State (1879) 17 Fla. 183, 190. 6) See King V. State (1879) 17 Fla. 183, 190 - ("ill-fame"; reputation admitted both of the house and the individuals who resort to it); Atkinson V. Powledge (1936) 123 Fla.389, 167 so.4 (city ordinance making it a misdemeanour to keep a house "known or notoriously reputed", etc, held valid following King V. State).

one ie, whether the reputation, as an exception to the hearsay rule may be used to evidence the character.[1]

A house of ill-fame, or bawdy-house, signifies a house commonly resorted to or lived in by prostitutes for purposes of prostitution; thus, one element in the offence of keeping it may be the kind of person resorting to or living in it. Now it is usually understood by courts that this element of the crime involves, not merely the actual but also the reputed character of these persons as prostitutes, in which case their reputed character becomes a fact in issue.[2]

As amply demonstrated under the discussion of similar facts evidence and evidence of similar happenings, the condition or character of a place or thing may sometimes be proved by showing the dangerous condition for example, of a dock that other drownings had occurred thereat.[3] In Ship V. King,[4] evidence of previous convictions was admitted to prove the character of a place as a gaming house, even though the accused was not found therein. Also, to prove the character of a place as disorderly, convictions of former occupiers are receivable though the present one is admittedly respectable.[5] As pointed out above, a number of other issues under this head have been discussed under similar facts evidence in civil cases with regards to evidence of similar happenings, and it is not necessary to give it a repeat treatment here.

There are still some other instances when the bad character of a person is admissible against him. On a charge of homicide, the bad character of the deceased and previous assaults by the latter[6] have

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1) See Wigmore, Evidence at § 1620
2) State V. Koettgen (1915) 88 N.J.L. 51, 95 At1 747 (Swayze: "Thieves and prostitutes do not gather in a church"; see also U.S.V.Stevens (1833) 4 Cr. C.C. 341. 3) Moore V. Ransom, 14 T.L.R. 539 C.A. 4) (1949) 95 C.C.C. 143 (Que.C.A.); R V. Fralkow (1936) 2C.C.C. 42 (Ont.C.A.)
5) R V. Miskin Higher (1893) 1 Q.B. 275.
6) R V Hopkins 10 Cox. 229; See post

been received to show that the prisoner had reasonable grounds for apprehending violence. And in America, evidence of the character of, and threats by the deceased is admissible on a plea of self-defence.[1]

It is pertinent to draw attention to the provisions of Uniform Rule 47,[2] and the Federal Rules of Evidence (R.D. 1971) 404,[3] both of America. The Uniform Rule 47, states that: "Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of conviction of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offence charged (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted only after the accused has introduced evidence of his good character".

Federal Rules of Evidence, 404 states: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1)..... evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2)....., evidence of a pertinent trait of character of the victim

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1) Wigmore on Evidence, ss. 63, 110, (3rd ed.); See R V. Biggin (1920) 1 K.B. 213.
2) Uniform Rules of Evidence (1953)
3) Federal Rules of Evidence (America) (1971)

of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3)..... evidence of the character of a witness, as provided in rules 607, 608 and 609.... Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident".

I would think that provisions of Uniform Rule 47 appear clearer than that of Federal Rules of Evidence 404, though the latter seems to cover a much wider scope by its provision, infact its general provision is quite applicable to evidence of similar facts, since it seems to be more concerned with the use of character as a means to prove circumstantially that a person acted in conformity with his character in a specific instance. However, by express exception to the exclusionary principle of Rule 404, an accused may introduce particularly relevant character trait as circumstantial evidence of his innocence, and the prosecution is then permitted to rebut this evidence by introduction of pertinent bad character traits of the accused. Additionally, an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defence to a charge of homicide or consent in a case of rape, and the

prosecution may introduce similar evidence in rebuttal. The Rule also permits the prosecution to introduce evidence of a character of peacefulness of the victim to rebut the defendant's allegation that the victim was the first aggressor. It also prohibits the use of other crimes, wrongs, or acts to prove the character of a person in order to establish guilt circumstantially. Analysed this way, makes it much easier to see its congruency with other common law rules earlier stated. As I have earlier notified, most of these issues will still be considered more elaborately in later discussion.

(2) EVIDENCE OF CHARACTER OF THE PARTIES IN CIVIL CASES

Subject to some specific exceptions, it is generally said that the character of a party in a civil cause is inadmissible; in other words, it cannot be used, as it is used for or against a defendant in a criminal case, to indicate the likelihood that the act in issue was or was not done. A good illustration of this rule is Attorney-General V. Bowman,[1] where it was said that "a defendant to an information for keeping false weights was precluded from calling a witness as to good character on the ground that the proceedings although criminal in form were civil".

This common law rule of evidence has been enacted into statutory provisions in some common-wealth countries. In Nigeria for instance, section 66 of the Nigeria Evidence Act[2] states that: "In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant". Section 52 of the India Evidence Act[3] contains exactly the same provision. It is clear from the provision of the section that it deals with the relevancy of character evidence in civil cases of the parties involved in the litigation. Since the rule of evidence with regard to character of the parties in civil cases is adequately and correctly represented by the above provision of the Nigeria Evidence Act and its Indian equivalent, it will be worthwhile and neccesary to take a closer look at the words of the section for a

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1) (1791), 2 Bos. & P. 532
2) Nigeria Evidence Act 1945
3) India Evidence Act 1872

proper understanding. Since both relevant sections of the Acts contain exactly the same words, I intend whatever interpretation I give to be applicable to both; save for the definition of the word 'character', which has a different meaning in each of the countries. The meaning of character under the India Evidence Act is contained in the explanation to section 55 of the Act, which states that: "In section 52, 53, 54 and 55, the word 'character' includes both reputation and disposition"; while under section 71 of the Nigeria Evidence Act, the word 'character' has been given a different meaning following the definition given by the majority judgement in R V. Rowton,[1] to the effect that: "In sections 66 to 70, the word 'character' means reputation as distinguished from disposition, ...". Much more has earlier been said about the defintion of the word 'character' and so in the meantime, we can consider the other aspects of the interpretation of section 52 of the India Evidence Act and section 66 of the Nigeria Evidence Act.

Character we know, may refer to the character of the parties to a litigation or the character of thier witnesses. The expression 'any person concerned' may include both witnesses and parties, but obviously it refers to the parties, in this connection. This section does deal with evidence of character, in reference to the parties in civil cases, to the effect that, evidence of character, good or bad, is generally irrelevant in civil cases, unless character is of the substance in issue.[2]

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1) (1865) L. & C. 520; 169 E.R. 1497
2) See Lakes V. Buckeye State Mut. Ins. Ass. 110 Ohio App. 168 N.E. 2d 895 (1959); see also Greenberg V. Aetna Ins. Co. (1967) 427 Pq. 494, 235 A. 2d 582.

Character is of no value when the issue is whether, a contract was entered into or not, or whether there was payment of money or consideration. In action for seduction the character of the female for chastity is directly in issue and may be impeached either by general evidence of misconduct or proof of particular acts. When a person's general character is in issue, evidence may of course be given of his general character, whether in civil or criminal cases. But where character is not in issue in any civil case evidence of character cannot be given with a view to show that any conduct imputed to him is probable or improbable. It is the settled policy of the law to reject character evidence of parties in civil cases in proof or disproof of any act attributed to him. The rule therefore, is that each transaction is to be determined by its own circumstances and not by the character of the parties.

(1) RATIONALE

The question for us to consider now is, what is the rationale for excluding character evidence of the parties in civil cases, and that question will be answered shortly. It is worth mentioning that the reasons for the exclusion in civil cases, differ wholly from the reasons forbidding the prosecution's use of the character of an accused person. The reasons advanced for the exclusion of character evidence in civil cases, can be categorised as follows:-

Firstly it is a common assertion that a party's character is usually of no probative value; for example, where the issue is whether a contract was made or broken, whether money was paid or

property improved by mistake, whether goods were illegally converted or a libel published, there is no moral quality in the act alleged, or at any rate any moral quality that may have been present is ignored by the law. In some other cases like seduction, such a moral quality may appear; but apart from these exceptions, it is either non-existent or immaterial. And talking about the rationale for exclusion in civil cases generally, the opinion of Martin, B, in Attorney General V. Radloff,[1] comes easily to mind; he said: "In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence because there is a fair and just presumption that a man of good character would not commit a crime . But in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty, alleged against him".

While the above statement deals with the introduction of evidence of good character, the same prohibition applies with respect to evidence of bad character,[2] unless the evidence meets the rigid standards relating to the admission of evidence of similar acts.[3] In Thompson V. Church,[4] a case 'qui tam' for an assault, the defendant's character as a malicious, quarrelsome man was rejeced. And it was observed per curiam, that: "The general character is not is issue. The business of the court is to try the case, and not the man; and a

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1) (1854) 10 Ex. 84; 23 L.J. Ex. 240; 156 E.R. 366;
2) See Sinclair V. Ruddell (1906), 3 W.L.R. 532; see also Laid V. Taxi Cabs Ltd (1914) 6 O.W.N. 505 (C.A.)
3) See Post - Similar Facts Evidence
4) (1791) 1 Root 312

very bad man may have a very righteous cause"; and this I think is actually the meat of the reason.

The second rationale usually given for the exclusion of character evidence in civil cases, is a more complex one, termed 'Anxilliary policy';[1] it has been pointed out by several courts as equally sufficient for exclusion. And this concept of 'Anxilliary policy' can be best examined in the brief discussion we can give it now, by looking at some of the elucidating judicial statements on it.

Hosner, C.J. in Stow V. Converse,[2] observed that: "It is not only in contravention of the fundamental rule that evidence shall be confined to the issue, to admit such testimony; but it would be infinitely dangerous to the administration of justice. Instead of meeting a change of mis-conduct by testimony evincive of not having misconducted, general character would become the principle evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general would shelter himself from the wrongs he had perpetrated". In that case, the plaintiff's good character was not received to rebut a slander.

In Wright V. McKee,[3] Aldis, J., said: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed; and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced; it may then perhaps suffice to turn the wavering scales; very rarely can it be of substantial use in getting at the truth. It is uncertain in

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1) See Wigmore On Evidence, § 29
2) (1820) 3 Conn. 345
3) (1864) 37 Vt. 163

its nature both because the true character of a large portion of mankind is ascertained with difficulty; and because those who are called to testify are reluctant to disparage their neighbours, - especially if they are wealthy, influential, popular, or even pleasant and obliging. It is mere matter of opinion, and in matters of opinion, men are apt to be greatly influenced by prejudice, partisanship or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the first one who speaks to them on the subject or to form their opinion upon the opinions of others. The introduction of such evidence in civil cases wherever character is assailed would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that is easily manufactured, is liable to abuse, and if in common use in the courts as likely to mislead as to guide aright".

And another good reason for the exclusion of character evidence (especially bad character this time) of the parties in civil cases, is the argument that, to admit character evidence would be to surprise the parties and to allow to create prejudice or bias for or against a person. As Sir James Stephen[1] put it: "If it had not been for the Rules of Evidence, the reputation of half the population of the village would have been torn in pieces. The rules of evidence kept matter to apoint, and so minimise the evil; but the parties, the witnesses, the attornies, all appeared to me to be, one more anxious

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1) Sir James Stephen, (1872), The India Evidence Act, p.9

than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman and child, whose name was in any way brought into the discussion. The French courts display this evil, in an aggravated form".

While the courts generally appear to exclude character evidence in civil cases on the basis of irrelevance, the real rationale from the above is the policy to restrain civil proceedings within manageable limits and to prevent unfairness to civil litigants, who cannot be expected to be prepared to protect themselves against imputations which may range over their whole career, without previous notice.[1] All these reasons combined seemed to justify the general policy of the law of evidence excluding the character of the parties to a civil cause when offered to prove or disprove the doing of an act, but, as it would soon be revealed, a strict and rigid following of the rule has caused some embarrasment to the law itself by giving rise to some indefensible decisons; it has become clear that such rules may actually constitute a clog, in the form of a barren technicality, in the wheel of justice.

In criminal cases, the exception referred to by Martin, B., was introduced at the beginning of the nineteenth century.[2] The rationale for allowing this evidence in criminal cases was clearly based on its relevance. Thus, in R V. Rowton,[3] Willes J. said: "Such evidence is admissible, because it renders it less probable that what the prosecution has averred is true, it is strictly relevant to the issue.....".

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1) 13 Halsbury (2nd ed.) p. 572; See also Edwards et al. V. Ottawa River Navigation Co. (1876), 39 U.C.Q.B. 264.
2) 1 Wigmore On Evidence (3rd ed., 1940), p. 451
3) 169 E.R. 1497 at 1506

If the logical relevance of the evidence were the test of admissibility, it would be difficult to rationalise its exclusion in civil cases and its admission in criminal cases. In tort actions such as assault, deceit and negligence, evidence of good character on the part of the defendant would appear to be as relevant as the evidence of good character of the accused in a criminal case; and this is the basis of the debate that has been most fiercely contested in the United States.

To start with, I would think that it may be maintained that the reasons of the policy apply in ordinary civil cases only, and that where a moral intent is marked and prominent in the nature of the issue, the defendant's good moral character should be received as in criminal cases. Such a modification would save us from such appalling decisions as was given in Lester V. Gray,[1] where in a suit of assault and battery against a physician by a woman for "lasciviously manipulating her person".... "in the course of a pretended treatment", the defendant offered his "general good character and high reputation as a physician" but was excluded. To my mind this sort of decision can certainly not be justified, as the issue clearly involves one of conduct and probably there is in this case a special need even beyond that in most cases of charges of crime in civil actions, for knowing the character of the defendant. Wigmore,[2] in criticising the decision in this case, described it as "an example of juristic arteriosclerosis in letting a rule of thumb stiffen into

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1) (1928) 217 Ala. 585, 117 So. 211
2) See ante.

inflexibility; such a ruling makes it dangerous for honourable physicians to treat neurasthenic patients in private".

However, in Hicker V. Hicker,[1] in a divorce suit, alleging wife's adultery, wife's character for chastity was held admissible on her behalf 'to disprove the acts charged'. I think there is argument for cases of this nature that makes it necessary for such evidence to be made admissible.

The question one may ask is why some cases that naturally fall within the ambit of civil cases should be treated differently; and the answer to that question is not far fetched.

As earlier pointed out, in a special dispensation to criminal defendants whose life or liberty were at hazard, the common law relaxed its ban upon evidence of character to show conduct to the extent of permitting the accused to open the door by producing evidence of good character. The question however, is that, should the same dispensation be accorded in a civil action, to a party who has been charged by his adversary's pleading or proof with a criminal offence involving moral turpitude?

Walworthch J. observed in Townsend V. Graves[2] that character is admissible in cases of 'a crime, of any other act involving moral turpitude' if evidenced only 'by circumstantial evidence or by the testimony of witnesses of doubtful credit'.

Most courts seem to argue that the peril of judgement here is less, and as such they have declined to pay the price in consumption of time and distraction from the issue which the concession entails.

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1) (1899) 158 Ind. 425, 55 N.E. 81;
2) (1832) 3 Paige Ch. 453, 455

For instance in Goodright V. Hicks,[1] where a will was impeached for fraud, the defendant was not allowed to prove his good character in answer; and in Kornec V. Mike Horse Mining.....[2] in an action for assault, the defendant's good reputation for peacefulness was excluded.

Foremost in the cases opposed to this line of rulings is Ruan V. Perry;[3] in that case, the defendant a naval officer had ordered the plaintiff's vessel, a neutral, to lie to, and had taken her out of her course, by reason of which she was captured by a belligerent captain; and the defendant's good character was received because the evidence was purely circumstantial. Tompkins J. observed that: "In actions of tort and especially charging a defendant with gross depravity and fraud, upon circumstnaces merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances".

In Fowler V. Insurance Co,[4] a case involving the defence of fraud, in an action on an insurance policy, the plaintiff's good character was excluded. Savage C.J., observed to the effect that: "A specific fraud is charged that must be met on its merits, unless supported only by circumstances, as in the case of Ruan V. Perry..... Every man must be answerable for every improper act; and the character of every transaction must be answerable for every improper act; and the character of every transaction must be ascertained by its

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1) (1801) Bull. N.P. 296; 4 Esp. 50
2) (1947) 120 Mont. 1, 180 p. 2d 252
3) (1805) 3 Caines 120
4) (1827) 6 Cow. 673

circumstances, and not by the character of the parties". The decison in this case is based on proof on circumstances only; generally it represents the rule with regard to the present discussion. But it failed to disapprove of the opinion of Tompkins J., in Ruan V. Perry; as a matter of fact it appears to acquiesce.

However, there is a growing minority of cases, in which the judges are impressed with the serious consequences to the party's standing, reputation and relationships, which such a charge involving moral turpitude, even in a civil action may bring in its train, and have chosen to follow the criminal analogy, by permitting the party to introduce evidence of his good reputation for the trait involved in the charge. In a long and elucidating statement, Start C.J., observed in Hein V. Holdridge,[1] that: "There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with the crime.... The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. On principle, however, it would seem that there ought to be exceptions to this general rule... In as much as the general rule is not based upon any philisophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character, or, in other words, that such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting

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1) (1900) 78 Minn. 468, 81 N.W. 522, 523.

such evidence in criminal cases. Civil actions for an indecent assault, for seduction, and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The consequences to the defendant of a verdict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a caes to be deprived of the right to lay before the jury evidence of his previous good character because it will tend to confuse the issue, while a defendant in a case where the state charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? ..... (But the doctrine) ought not to be extended to civil actions where the issue relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions".

I would like to make certain observations about his statement, especially in the light of subsequent decisions that share part of his views. In the first place, he seems to have limited his concern for the use of previous good character, to defendants only, while many other cases apply it with regards to the plaintiff's. It could

be that Start C.J., actually intends his statement to be applicable to both parties to a litigation, even though he seems to have only referred to the defendants expressly. Secondly, he restricted instances where he would like to see good character admissible to cases of indecent assault, seduction, and kindred cases, and excluding cases of simple assault, fraud, deceit and negligence, or to similar actions. The thing about a case like this is that there are always loose ends. In the first set of limitation where good character is admissible, only two categories of cases is mentioned, and other cases can easily be fitted into the 'kindred cases'. There is also another thing, and that is that even in the other set of cases which he does not expect the rule to apply, serious issues of moral turpitude can always be read into them, and they too could be argued to be just as much "mere speculative and blackmailing schemes", especially in cases involving fraud and deceit, and it appears to be the view of later decisions.

For instance in the case of The United States V. Genovese,[1] which was about the cancellation of naturalisation for fraudulent answers, the defendant's good character was said to be admissible as in criminal cases. And in Waggoman V. Ft. Worth Well Machinery & Supply Co.[2] where the plaintiff sued for false imprisonment and to cancel a note for duress; counter claim was brought charging the plaintiff with embezzlement. The court held that the plaintiff was properly permitted to include evidence of his good character for honesty and veracity. However, I think the holding is erroneous, as to the

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1) 133 F. Supp. 820 (D.N.J. 1955)
2) (1934) 124 Tex. 325, 76 S.W. 2d 1005, 1006

latter trait admitted for embezzlement.

In Hess V. Marianari,[1] a case of assault, with claim for punitive damages, the court held that since such claim requires finding of criminal intent, the defendant is entitled as in criminal cases to show his good character for people. And this point was mentioned in the later case of Skidmore V. Star Insurance Co.,[2] which approves the majority rule rejecting evidence of character to show conduct in civil cases; and it distinguishes the Hess' case on the inadequate ground that criminal intent was their material.

As expected, the tendency has always been to expand the scope of the exceptions. Thus we know that when the defendant pleads self-defence, he may show the plaintiff's reputation for turbulence if he proves it was known to him, on the issue of reasonable apprehension.[3] Thus on a charge of homicide, the bad character of the deceased and previous assaults by the latter,[4] have been received to show that the prisoner had reasonalbe grounds for apprehending violence. When on a plea of self defence or otherwise, there is an issue as to who committed the first act of aggression, most courts seem to admit evidence of the good or bad reputation of both plaintiff and defendant for peacefulness, as shedding light on thier probable acts.[5] Under these circumstances such evidence throws light upon the intention of the accused and the reasonableness of his acts and may tend to establish his innocence or the degree of guilt.[6]

On the whole, the balance of expediency is close one, and so

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1) (1918) 81 W. Va. 500, 94 S.E 968. 2) (1943) W.Va. 307, 27 S.E. 2d 845 3) See Dingle V. Hickman (1922) 32 Del. 49, 119 Atl. 311; Linkhart V. Savely (1950) 190 Ore. 484, 227 P. 2d 187; Martin V. Estrella, 266 A. 2d 41 (R.I. 1970). 4) R V. Hopkins, 10 Cox. 299 5) See Cain V. Skillin (1929) 219 Ala. 228, 121 So. 521, 64 A.L.R. 1022; Linkhart V. Savely, (1950) 190 Ore. 484, 227 p. 2d. 6) Field V. State, 47 Ala. 603.

usually when the issue is merely whether the defendant committed the act charged, the court would presumably admit or exclude defendant's evidence of good reputation according to their alignment with the majority or minority view on the general question as discussed above.

Greenleaf,[1] observed as follows: "And generally in actions of tort, where-ever the defendant is charged with fraud from mere circumstances evidence of his general good character is admissible to repel it"; thus supporting the growing view that if a party if charged with fraud or other act involving moral torpitude and the charge is based only on circumstantial evidence, he may rebut the charge, by proof of good character.[2] But this view is undisputably contrary to the rule in civil case and there is also a weight of authority against it; and it does not seem to be based upon a recognisable principle of the law of evidence as well.

I would like to, say that I share the view expressed by Start C.J., in Hein V. Holdridge.[3]

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1) At s. 54
2) Henry V. Brown 2 Heisk (Tenn.) 213;
3) (1900) 78 Minn. 468, 81 N.W. 522, 223.

(ii)

EXCEPTIONS: GENERAL

With respect to the character of parties to a cause Best[1] observed: "The law of England meets the difficulty by making a distinction between cases where their character ought to be supposed to be in issue and where it ought not. According to the general rule, upon the whole probably a just one, it is not competent to give evidence of the general character of the parties in forensic proceedings, much less of particular facts not in issue in the cause, with a view of raising a presumption either favourable to one party or disadvantageous to his antagonist. But where the very nature of the proceedings is to put in issue the character of any of the parties to them, a different rule necessary prevails; and it is not competent to give general evidence of the character of the party with reference to the issue raised but even to inquire into particular facts tending to establish it. Thus in actions for seduction, the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct or proof of particular acts".

Thus it is clear as demonstrated above that evidence of character, good or bad is generally irrelevant in civil cases unless character is of the substance in issue. When a person's general character is in issue, evidence may of course be given of his general character, but where character is not in isse, evidence of character cannot be given. A good example of when a party's character is in issue is the example of seduction action given above by Best. And another good

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1) Best On Evidence, Sections 257, 258

obvious example is that of actions for defamation. On the issue of liability, the character of the plaintiff (which is, at the outset, presumed rebuttably to be good) will not necessarily be in issue, as where the defence is one of privilege or fair comment on a matter of public interest; but if the defence is one of justification, at least some aspect of the plaintiff's character, to an extent determinable from the pleadings will be the subject of the case.[1] The pleaded particulars may be broad enough to put in issue the plaintiff's character in every sense, so as to comprise his general reputation, his disposition to behave in certain ways or specific incidents of his conduct, or they may be limited to one or more aspects of character only.

This principle is by no means confined to defamation and seduction cases. For instance in Hurst V. Evans,[2] where the defence to an action against an insurance company was that the loss was sustained by the dishonesty of the plaintiff's servant; it was admissible to prove that the servant was a known associate of burglars and had entered the plaintiff's service on a forged reference; thereby admitting both general and specific evidence of character.

Lord M'Claren observed in the case of Charles Bern (Bern's Executor) V. The Royal Lunatic Asylum of Montrose,[3] that: "....in the case of actions of slander, and claims of damages for seduction, or breach of promise of marriage, the institution of such an action always and necessarily puts the character of the pursuer in issue".

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1) Fountain V. Boodle (1842) 3 Q.B. 5.
2) (1917) 1 K.B. 352
3) (1893) 20 R. 859, L. M'Claren at p. 863; see also Hyslop V. Miller (1816) 1 Mur. 43 at 49; C V M (1923) S.C. 1 L.P. Clyde at p.4.

This statement is as true in Scotland, as it is in the other common law countries and America too. So, in a more limited context, character will always be directly relevant to the measure of damages, assuming that the issue of liability is determined in favour of the plaintiff. Character as affecting damages must rank the most significant exception to the general rule in civil cases.

Though a person's character is not relevant in civil cases to show the doing or not doing of an act by him, it is quite clear as Wigmore,[1] observed that "..... there are two ways in which character may be involved, - one an evidential question, the other not. (1) Whether a person's character is evidentiary for any other purpose, for example, a wife's character to show that the husband's alienation of affection was a natural consequence. (2) Whether a person's character is under the legal principles and the pleading of the case one of the issues in it e.g., the character of a plaintiff in defamation, either as expressly brought in issue by a plea of truth, or as issuable in the assessment of damages; the character of an employee as involving the employer's liability to a fellow servant for the selection of incompetent employees; the character of a house charged with being used for immoral traffic; and so on". It is my view that the latter part of sections 66 and 52 of the Nigeria and India Evidence Acts respectively, adequately covers these exceptions; though it is put in limited words, it has wide meanings. "In civil cases" it is stated, "the fact that the character of any person concerned is such as to render probable or improbable any conduct

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1) Wigmore On Evidence, § 54

imputed to him is irrelevant, EXCEPT in so far as such character appears from facts otherwise relevant".

One issue I would go back to briefly is that of the admissibility of evidence of character where justification is pleaded. As already pointed out,[1] the defendant can in support of a plea of justification, adduce evidence both of general and specific acts to prove that the alleged defamatory statement is true. The positon was undoubtedly reiterated in the case of Maisel V. Financial Times,[2] where in an action for libel the plaintiff in his statement of claim interpreted the libel by an innuendo which was in substance, (1) the words complained of referred to acts dishonestly done by him and (2) that he was a man of dishonest character and unfit to be a director. Upon this the defendants, the proprietors of the newspaper in which the article complained of was published, justified and gave particulars of other dishonest acts besides those referred to in connection with the plaintiff's arrest, by which they sought to establish that the plaintiff was a man of dishonest character and unfit to be a director by reason of various things he had done or that had occured to him. The plaintiff moved to have these particulars struck out; the court held that, in as much as by the construction which the plaintiff himself had placed upon the libel, the defendants were sued for charging generally that he (the plaintiff) was a dishonest person, they were entitled to give particulars to show why they said that the plaintiff was a dishonest person and the particulars objec-

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1) See Fountain V. Boodle (1842) 3 Q.B. 5; Hurst V. Evans, (1917) 1 K.B. 352
2) (1915) 84 L.J. K.B. 2145; 112 L.T. 953; 31 T.L.R. 192.

ted to were admissible. In his speech, Lord Loreburn commenting and approving the court of appeal judgement said: "Lord Justice Phillmore in his judgement said a few words which he would venture to repeat. The Lord Justice said: If the libel says of the plaintiff 'You did one specific act, you stole a hatchet', it is a fair enough justification to say those words are true in their natural and ordinary meaning - 'You did steal it'. But if the allegation in the libel is an allegation of conduct or life, or character or the coverse thing, then it is not enough to say the words are true. You have got to say the words are true because the plaintiff has done so and so if the imputation is that the plaintiff is a thief, you have got to say it is true he is a thief because he stole on this, that, or the other occasion, or tried to steal on this, that, or the other occasion, and was only prevented by main force or something of that kind".

This brings us to the question, and that is that, in cases where justification is pleaded, why should the defendant be exceptionally allowed to use the plaintiff's bad character as evidence of his probable guilt, without reciprocating, by allowing the plaintiff to give evidence of his own good character. There is something we should note, and that is that the present problem must be distinguished from the question where the plaintiff's reputation may be considered in mitigation of damages. That is different, and in such cases the plaintiff is allowed to prove or give evidence of his good character; I'll be going into that shortly. A good illustration of the present issue is Cornwall V. Richardson,[1] where in an action

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1) (1825) Ry & Moo. 305

for defamation, evidence of the plaintiff's good character was held irrelevant even though justification was pleaded.

The question to be considered can be hypothetically illustrated like this. For instance, where A is said by B to have been guilty of murder or forgery, and in a suit for defamation is met by a plea of truth, so that the issue is whether A committed the crime or murder or of forgery, it is supposed by some courts that A should be allowed to invoke his good character for peacefulness or for honesty, as bearing on the probability of his having committed the crime which B is trying to prove against him. I would think that it may be unfair to disallow such evidence in this circumstances as it is the best avenue in such a situation for the plaintiff to prove his innocence. There is much reason for assimilating the situation to that of an accused person and taking it out of the rule applicable ordinarily; not only because the plaintiff is repudiating an accusation of crime, but also because an unfavourable outcome affects his character to a degree equivalent to a punishment and crime, a significance wholly absent after the loss of an ordinary civil suit. Supporting this view Mr. Thomas Starkie[1] said: "Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit a very different consideration, for there the party is charged with a crime, and in such a case character affords the same presumption of innocence as if the party had been tried for the offence".

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1) Evidence, II, 305, (1824)

In Sample V. Wynn,[1] where on a charge of bestiality, the plea of truth was made, Nash C. J., said: "the nature of the crime charged upon the plaintiff is of the most odious character, the preferring of which is calculated to banish the individual charged from the ordinary intercourse of his fellowmen, to brand him with an offence more odious than that which drove Cain into the wilderness and made him a wanderer upon the face of the earth..... the crime charged is detestable and there is but one witness to the foul deed. In such a case, how can the purest man that lives, shield himself from the effects or revenge if not permitted to resort to such evidence?"

It is clear that subsequent cases have allowed the plaintiff to evidence of his good character. For example, in Powel V. Harper,[2] in a libel charging the plaintiff with stolen goods and justification was pleaded, the plaintiff's general character for honesty was admitted on his behalf. And in Harding V. Brooks,[3] in a slander charging the plaintiff as "a liar, a knave and a rascal" and justification was pleaded, the plaintiff's evidence of good character was received, in order by "proof of the general tenor of his conduct and character to repel such imputations", and it was used to repel charges of specific misconducts.

The usual answer to this line of authorities by those against it is that such practice puts the plaintiff in a position relatively too favourable, as against the defendant who already has the burden of proving his plea of truth.

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1) (1853) 1 Busbee 321
2) (1833), 5 C. & P. 589
3) (1827) 5 Pick. 244, see also, Bavington V. Robinson (1915) 127 Md. 46, 95 Atl. 1067

(a) CHARACTER AS AFFECTING DAMAGES IN CIVIL CASES

I would think that it is well settled that character may be directly in issue, either on the question of liability or the quantum of damages. The causes of action in which this occur, and in which the present discussion will be based are (a) Defamation, (b) Breach of Promise of Marriage, (c) Seduction and (d) Actions in which damages for Adultery are claimed. Strictly speaking, character as affecting damages does not properly belong to the Law of Evidence, but to the Law of Damages, because character or reputation, is here admitted not for rendering probable or improbable the conduct or act attributed, but for something else; the object is to ascertain the amount of damages by an inquiry into reputation. One question that may arise is whether the plaintiff's bad character is relevant in all cases in determining the amount of damages; the answer is NO. For instance, character will not be relevant in determining the amount of damages to be awarded for being bitten by a dog, or for injury caused by a railway accident; such cases do not consider the plaintiff's character. Before considering the arguments and other finities, I will like to consider the general principles.

In civil cases, good character being presumed may not be proved in aggravation of damages; but the party attacked may repel general evidence of bad character by general evidence of good character, or meet specific acts of impropriety by disproof of such acts though not by evidence of general good character.[1] Thus the pursuer as in Scotland, is entitled to substantiate his claim for damages by

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1) Jones V. James, 18 L.T. 243; Narracott V. Narracott 33 L.J.P. & M. 61

proving that he is of good character, and the defender, in order to mitigate damages, is entitled to prove the contrary, as Lord Justice-Clerk Hope pointed out in M'Neill V. Rev. Gilbert Rorison[1], when he said: "As the pursuer put her general character in issue, and led evidence in regard to it, it was perfectly understood, and so the defendant admitted, that he might have called evidence to show that her general character was not what she represented, even although such general evidence might have gone to some of the imputations in this particular libel".

So, that the plaintiff under the forgoing doctrine may refute the imputations cast on his reputed character, by showing his good reputed character is not doubted. But whether he may go into it until it has been attacked has been the subject of much difference opinion. This divided opinion has resulted in some case of excluding good character before attack,[2] while some courts admitted it under similar circumstances.[3] The better view seems to be that this reputation is assumed to be good and that he has therefore no need to sustain it until it has been attacked. In other words a plaintiff cannot give evidence of general good character in aggravation of damages, unless counterproof has been first offered by the defendant, for, until the contrary appears, the presumption of law is already in his favour. For instance in an action for seduction, where evidence was produced for the defence to prove that the girl had previously had a child by another man, Lord Ellenborough would not allow a

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1) (1847) 10 D. 15, L.J. Cl. Hope at 34; L. Moncrieff at pp. 26, 27
2) Buckeye Cotton Oil Co V. Sloan (1918), 6th C.C.A., 250 Fed. 712; Draper V. Hellman (1928) C.T. & S. Bank, 203 Cal. 26, 263 Pac. 240.
3) R V. Waring (1803) 5 Esp. 13; Williams V. Greenwade (1835) 3 Dana 432.

question to be asked respecting her general good character for chastity, but restricted the plaintiff to the proof that the specific charge made by the defendant was false.[1]

In Plato Films Ltd. and others V. Speidel,[2] it was decided that in an action for libel or slander, although the good character of the plaintiff is presumed at the outset, he may, notwithstanding, adduce evidence through witnesses other than himself as to his reputation. And the case goes further to give the types of questions which the character witnesses may answer as: "'What are you? How long have you known him? Have you known him well? Have you had an opportunity of observing his conduct? What character has he borne during that time for honesty, morality or loyalty (according to the nature of the case)? As far as you know, has he deserved that character?'"[3] A character witness called by the plaintiff cannot, however, be asked questions in examination-in-chief about particular facts to illustrate the plaintiff's good behaviour. In cross-examination, however, the witness may be asked about particular facts known to him in order to test the grounds of his belief.[4]

Bad character is admissible in chief in mitigation of damages, in defamation cases, provided that it would not, if pleaded, amount to a justification.[5] Originally, early English rulings were all inclined to admit bad repute, under the general issue, in mitigation[6] as stated above, but then came a series of rulings excluding it.[7] However, subsequently, the earlier line of rulings was restored[8] and such evidence became admissible again. "Stephen extends this to all

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1) Bamfield V. Massey, 1 Camp. 460
2) (1961) 1 All E.R. 876
3) Plato Films Ltd & Ors. V. Speidel (1961) 1 All E.R. 876 at 889
4) Ibid
5) Watt V. Watt (1905) A.C. 115, 118
6) Dennis V. Pawling (1716) Vin. Abr. 'Evidence', I b, 16 (xii, 159); Knobell V. Fuller (1908) Peake, Add. Cas. 139, Lord Kenyon, C.J., Leicester V. Walter (1809) 2 Camp. 251; Williams V. Callender (1810) Holt N.P. 307; Snowdon V. Smith (1811) 1 M&S. 286 7) Jones V. Stevens (1822) 11 Price 235; Bracegirdle V. Bailey (1859) 1 F. & F. 536.
8) Scott V. Sampson (1882) L.R. 8 Q.B.D. 491.

civil cases,[1] but this seems unsuitable; and Taylor[2] confines it to a actions for defamation, seduction, breach of promise and for damages for adultery, of which only the first survives today".[3] In Scotland, evidence of bad character in mitigation of damages seems to be admissible in all civil cases. However, as Phipson[4] himself realises, this "point is, ... of less importance now, since the person whose character is assailed may, if called as a witness, be asked as to such facts, even where amounting to a justifiction, on cross-examination to credit,[5] unless, indeed, he has been called by the opposite side,[6] or has merely been put into the box for cross-examination without having been asked any question in chief.[7] The judge must, however, explain to the jury the effect of the evidence and the nature of the issues that they have to try".[8]

One question that arises is that, where a plaintiff's bad character is admitted in mitigation of damages, is it the general bad character, or character for the particular trait - specific acts - that should be used? The House of Lords in Plato Films Ltd. V. Speidel,[9] appears to favour the view that only evidence of general bad character should be admitted. It is however clear, whatever view one holds, that the adduced evidence must relate to the segment of the plaintiff's life to which the defamation relates. I am strongly attracted by a passage in Lord Ratcliffe's speech in Plato Films Ltd. V. Speidel, in which he dissented from the reasoning of the other members of the House of Lords. He said: "These considerations lead

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1) Art. 57.
2) Taylor On Evidence, s. 356
3) Phipson On Evidence (12th ed.) § 543.
4) See Ibid
5) Watt V. Watt (1905) A.C. 115; R V. Perryman, 112 C.C.C. Sess. Pap. 655-656; Sievier V. Duke, the Times, May 7, 1904
6) Scott V. Sampson, 8 Q.B.D. 491
7) Bracegirdle V. Bailey, 1 F & F. 536 8) Scott V. Sampson, 8 Q.B.D. 491; Wood V. Cox, 4 T.L.R. 652, 655; Plato Films Ltd V. Speidel (1961) A.C. 1090 (H.L.) which overruled Wood V. Durham (1888) 21 Q.B.D. 501
9) (1961) A.C. 1090

me to the opinion that it would be wrong to hold that general evidence of reputation, which must mean reputation in that sector of a plaintiff's life that has relevance to the libel complained of, cannot include evidence citing particular incidents, if they are of sufficient notoriety to be likely to contribute to his current reputation. Such incidents are, after all, the basic material upon which the reputation rests, and I cannot see the advantage to anyone of excluding the better form of evidence in favour of the worse. It remains true that the issue is not whether the incidents actually happened but whether it is common report that they did. If it is, that seems to me to be the best available evidence of a plaintiff's reputation. I find it difficult to combine an aversion from rumour with an indulgence for general evidence of reputation which, unvouched, is virtually the same thing".

Without going into the plausibility of his last sentence, one thing is clear, and that is that, there are arguments, for the use of eivdence of specific acts, and these arguments date back a long time.

In Steinman V. McWilliams,[1] it was argued that general character alone should be considered. Coulter, J., observed as follows: "Can evidence of seperate and particular departments of character be lawfully allowed? ..... How is character estimated? Certainly by its general import. It will not do to take up the Decalogue and inquire whether a man is generally represented as addicted to fornication or adultery, to profane swearing, sabbath-breaking.... If this mode of destroying character was allowed in courts, the standing of all men

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1) (1847) 6 Pa. St. 175

would be in peril. We have but few catos among us; and if we had more, such individuals would hardly seek redress in our courts. But the law is not for the protection of such men, but for the protection of that middle class all the world over, who have a sense of truth, honour and virtue, and who are yet not above the infirmities of life; whose sensibility as to the value of character and whose liability to err, make them more susceptible of wounds from the shaft of slander. The thousands of wagging tongues of this world sometimes in sport and sometimes in malice make free with some department or quality of character of good men in the main; and if malice were allowed to seize hold of these reports and embody them in a court of justice to destroy character, few men would be safe. The truth is that it is only in general character that a man find his true level in society; and that alone ought to mark his value".

In reply by those who would like to admit both evidence of specific acts, and general character, it is argued as evidenced in the speech of Strong, J., in Conroe V. Conroe,[1] that: "A man may have many virtues and consequently a good reputation, and yet be notorious for a single vice. If this virtues be called in question, it is an inquiry; but if only his vice be asserted, his injury is less.... (the plaintiff's) averment is not that her reputation for all the virtues which go to make up good character is fair, but that her reputation for chastity was sound; and it is that, she complains has been taken from her. Its real value was therefore a proper subject

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1) (1864) 47 Pa. 202

of inquiry".

Lastly, the argument that the reputation for the particular trait alone should be considered is set forth by Lyon, J., in Wilson V. Noonan[1]: "It is said that a person who brings such an action puts his reputation in issue; but it seems to be more accurate to say that he thereby puts it in issue in the particular wherein he claims that it has been assailed. Human reputation is complex in its nature. Because a man has a single vice, or even more than a single vice, it does not follow from that circumstance that he is totally depraved.... He may be an incorrigible liar, and yet strictly honest in all his dealings. He may be a great scoundrel in pecuniary matters, and yet perfectly chaste..... where a person's character for truth and veracity is falsely assailed, and he brings his action against the assailant to recover damages therefore, if his reputation for truth and veractiy is good, on what sound principle can it be said that if such plaintiff is unchaste, or dishonest in business matters, or coveteous, profane, or a sabbath-breaker, the damages to which he would otherwise be entitled shall be reduced to a normal sum?"

Having seen what the different arguments are, I don't think that the exclusive admissibility of general character should be encouraged even though the House of Lords seemed to have approved of it in Plato Films Ltd. V. Speidel[2]; and at the same time, I would not support an exclusive admissibility of specific acts. I would like to think that in mitigation of damages both evidence of general character and

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1) (1871) 27 Wis. 614
2) (1961) A.C. 1090 (H.L.)

specific acts of the plaintiff should be admitted and there are a number of cases in support of this. For instance, it has been held that in an action for seduction, the defendant may adduce evidence of general reputation for immorality and of specific acts on the part of the person seduced, committed prior but not subsequent to the act complained of.[1] The reason is that subsequent acts may have been brought about by the defendants own misconduct.[2] And in actions for criminal conversation, alienation of affections and enticement, the wife's general moral character and previous acts of adultery (not subsequent acts for the same reason as in seduction cases) may be proved by the defendant.[3] And in Jones V. James,[4] - an action for breach of promise to marry - the defendant pleaded a general charge of immorality and not merely specific acts of misconduct against the plaintiff. It was held that the plaintiff was entitled to give general evidence of good character for modesty and propriety for demeanour. But for the general allegation of immorality, it appears such evidence cannot be given by the plaintiff in the first instance, presumably on the theory that the plaintiff's character is not in issue unless the defendant attacks it. The defendant on the other hand can adduce general evidence of bad character and specific acts of immorality.[5]

It is worth knowing that in Scotland there is a practice that, even when evidence as to character or reputation is held admissible, evidence of specific criminal or immoral acts may be disallowed on

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1) Elsam V. Faucett (1856), 2 Esp. 562; Winter V. Henn (1831) 4 C & P. 494; see also McCready V. Grundy (1876) 39 U.C.Q.B. 316.
2) Phipson
3) Bromley V. Wallace (1803) 4 Esp. 237
4) (1868) 18 L.T. 243
5) Foulkes V. Selway (1801) Esp. 236

the practical ground of inexpediency.[1]

A person of bad character cannot claim the same amount of damages as a person of good reputation, this to me is the normal dictate of fairness, and as such evidence tending to increase or diminish damages should be admissilbe, though not expressly involved in the issue. However, legal problems are not as straightforward as the dictates of common sense, so this particular subject had not been without its own controversy and healthy arguments for and against. We can best illustrate the problem through a hypothetical situation; For example, where A sues B for defamation, and the issue is as to the proper amount of compensation, the question then arises whether it is fair to measure his compensation by the quality of his original actual standing in the community, and, in particular, whether the fact that he had little or no reputation to loose may be considered as good reason for diminishing the damages accordingly.

As earlier pointed out, the question here is not that of the Law of Evidence, that is, character or reputation for character is not offered as having probative value to evidence the probability of something else. What is actually involved here is a principle of the Law of Damages, i.e., whether compensation should be regulated according to a certain fact, namely, quality of reputation; if yes, reputation becomes material; if no reputation is immaterial, and will not be considered. In this connection however, it is more accurate to speak of 'reputed character' than of 'character', because it is less of reputation than less of character for which damages are claimed;

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1) See CVM. (1923) S.C. 1 L.P. Clyde at p. 4; see also H v. P (1905) 8 F. 232, Lord President Dune-din; A V.B (1895) 22 R. 402, Lord President Robertson at 404.

and futhermore, that this reputation is not offered evidentialy, but as an element brought into issue by the law of the case. A good illustration of the facts above is well passaged by Lord President (Clyde) in C V. M,[1] when he said: "In this case the pursuer asks for damages in respect of the harm done to her character by a slanderous statement alleged to have been made concerning her by the defender. It necessarily follows that she puts her character in issue; and therefore it is a relevant defence against her claim of damages to aver and prove that her character is such that it has not suffered any damage by the statement complained of. The point of such a defence is not that she is a bad character, but that she has a bad character. Accordingly, it appears to me that the amendment which the defender now proposes on answer 2, to the effect that 'the pursuer is well known in the neighbourhood in which she resides as a person of loose and immoral character, and she has suffered no damages as the result of the defender's statement,' is relevant and should be admitted. This amendment will provide sufficient basis for evidence to the effect that the pursuer's reputation was a bad one, and has suffered either no damage, or, at any rate, not as much damage as might otherwise have been the case".

This whole subject of the amount of damages is simply but adequately covered under the India Law of Evidence and Nigeria Law of Evidence by sections 55[2] and 69[3] of the respective Evidence Acts which incidentally contain same wordings, as follows: "In civil cases

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1) (1923) S.C. 1 at 4
2) (1872) India Evidence Act
3) (1945) Nigeria Evidence Act

the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant". Before going further into an explanation of the above provision, one may want to know about how the rule has been operating in England, from which the statutes have their origin.

In England, as earlier indicated, there was a divison of opinion as to whether in an action for defamation, the defendant may use the plaintiff's poor reputation or lack of reputation to mitigate the damages. The arguments on each side are strong, and so, it should be no surprise that this has been one of the most controverted questions in the whole law; and the balance of convenience is so clear, according to the point of view taken, that it is no wonder that courts have taken radically opposite views. The earlier English rulings were all inclined to admit bad character under the general issue, in mitigation. And a taste of the argument in favour of considering reputation can be found in view expressed by Mr. Holt,[1] he remarked that: "The ground of the action on the case for a libel is the 'quantum' of injurious damage which the person libelled either has or may be presumed to have sustained from the libellous matter... (Thus) the reputation cannot be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has therefore no basis for an action to recover compensation for the lcss character and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist".

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1) Holt's N.P. 308

Nolt, J., in Buford V. M'Luny[1] expressed a similar view when he said: " In every action at law the object is to recover reparation for some injury sustained. And where the injury is to property, the value of the article is the principal object of inquiry. And I can see no good reason why the value of character may not be investigated as well as that of any other commodity, when the reparation of character is the object of this suit... It is said it would be taking a person by surprise thus to permit an inquiry into his character. But if the character of a witness, who is called upon in court and compelled to give evidence without any previous notice, is not shielded from such an attack, how much less ought a party who has voluntarly brought his character into court claim such an exemption? He commences with stating that he is a person of good name, fame and reputation, and he ought to be always prepared to defend his allegation. A person is presumed to be always prepared to defend his general character, if he has a good one; if he has not, it ought to be exposed.... I hold that a woman ought not to be taken from the stews and brothels of a town, to be placed alongside the most respectable ladies who equally adorn out drawing-rooms and our churches; nor that the high priest of vice and corruption should be ranked with the pious priest of the parish or the respectable bishop of the diocese. Where a person's character is such that he cannot safely trust it to a court and jury, slander can do him but little injury; and a person who is neither ashamed nor afraid to expose his character to the eye of the public ought not to be permitted to shelter it under the forms of law from the eye of a jury".

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1) (1818) 1 Nott & M. 269

There were many other cases that were decided along this line.[1]

However, then came the series of rulings in which such evidence was excluded, and the opposing argument lays stress on the abuses to which the use of such evidence is open.

Livingston, J., in Foot V. Tracy,[2] presented his opposition in the following argument: "I am now satisfied that more mischief will follow from an adoption of such a rule than by excluding the investigation altogether except when presented as a complete justification in the form of a special plea.... It is answered that a person of bad fame has no right to bring a suit, or if he does, that he cannot expect the same compensation as those who have a character to lose. But no one, however low a man's reputation may be, has a right to publish slanders of him, or to charge him with crime of which he is innocent. If he confines himself to the truth, he can plead it; but if he will deal in general invective, or indulge his wit and venom by travelling out of the record, he must abide by the consequence. Nothing is better settled than that the truth of a libel or slander cannot be relied on in justification, unless pleaded. What is not permitted, then directly, ought not to be tolerated in any other way... (This result) will only impose on those who choose to publish their animardversions on the crimes or failings of others, which occupy so great a portion of our public papers, the task of proving by particular facts the truth of what they assert. Nor is there any hardship in this. Those who sport with the feelings of others, under the professions of zeal for the public good, on no other basis than

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1) Anon V. Moor (1813) 1 M & S. 284; Leicester V. Walter (1809) 2 Camp. 251.
2) (1806) 1 Johns. 46

that of common fame, which is not always an infallible guide, cannot complain if courts require from them, on these as on most other occasions, some better proof of their calumnies than general opinion. If every man who does not enjoy an unblemished reputation, or has the misfortune to be disesteemed by his neighbours, were fair game, in a country where the liberty of the press is so much perverted and abused, few indeed would escape".

Similar vigorous arguments are contained in the dissenting judgement of Cheves, J., in Buford V. McLuny.[1] He marshalled his argument in numbers thus: "(1) It is alleged that the pleadings put the character of the plaintiff in issue. Now it is not true, in point of law, that the character of the plaintiff is put in issue... (Since a plea denying the allegation would be demurrable). (2) But it is said that the foundation of the damages given in actions of slander is the actual injury suffered by the plaintiff in his character. This is not true; it is upon the presumption of loss (little more than a legal fiction) and not upon the actual loss, that actions of slander are principally founded..... Are not the heaviest damages given when the slander is uttered against unsullied and impregnable character, - where the malice of the calumniator has been shot 'like a pointless arrow from a broken bow'? To the tottering and questionable character, the shafts of the slanderer are fatal and ruinous, ... in such cases we know that the damages are usually nominal, though the injury is immeasurable and intolerable. Is it not, then,

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1) (1818) 1 Nott. & M. 272

amusing ourselves with a phantom, when we suppose that the actual loss sustained by the sufferer is the real foundation of damages in actions of slander? There must be other higher principles on which they are founded. Is it not obvious that the foundation of these damages is to be discovered in the general sanctity of character, which is considered as a sheild, not against the irreparable injury only, but against every possible assault upon the hallowed blessing of a good name? Even the wicked and the worthless are allowed this protection, as the infidel was once permitted to enter the christian sanctuary..... Ought (the defendant) not to be subjected to heavier penalties for thus oppressing the fallen, perhaps the broken-hearted and repentant and reforming offender; than if he had, with equal malice but with meaness, attacked the highest and most irreproachable man in the community? I should say he ought. (3) But if the admission of this evidence were clear, according to analogy and theory, it ought to be rejected in practice from its immateriality to a fair defence, and from the abuses of which it will be susceptible. It is immaterial, because, as far as such a cause should operate, it has its full influence (and too much) through the knowledge of the jury.... It is susceptible to the greatest abuses. The person, not of unblemished reputation, must suffer every calumny that the tongue can utter, in silence; for if he seeks redress against any specific slander, he must suffer the defects of his character to be exhibited and proclaimed in a court of justice by as many witnesses as the fears or malice of the defendant may choose to call. A man laboring

under a neighbourhood calumny, though perfectly innocent, must be the victim of every specific slander that may be uttered against him. He dare not enter the portals of a court of justice, or he will be doomed to eternal infamy by a thousand tongues".

This viewpoint was unanimously supported in Jones V. Stevens,[1] when in a case of slander, charging the plaintiff with being a disreputable and unprofessional attorney; testimony to his general bad character and reputation as an attorney was held inadmissible under the general issue. Graham, B. remarked that: "There is a full concurrence of opinion amongst the whole court that such general evidence of bad character is not admissible, ... and that principally on the grounds that a party cannot be expected to be prepared to rebut it, and that, if it were to be received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander". And Garrow, B., in his own judgement made an observation that: "If ever it should (become the law that such evidence should be adissible), the libeller will become a much more general character than we find now; for he will derive protection and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed, of resorting for redress, to courts of justice to vindicate his name, where it would be permitted to the defendant to bring forward testimony of general bad character which from its nature it would be impossible to dis-

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1) (1822) 11 Price 235, 256, 269

prove; whereby they in effect become the means of putting the libels of which they complain on the records of the courts of giving a wider circulation to the calumnies contained in them".

From these arguments, both for and against, it is obvious as earlier observed that the balance of convenience is so clear according to the point of view taken, and considering the views expressed by those who are for the exclusion, one cannot fail to appreciate some of the many interesting points made; they are certainly arguments that cannot in anyway be ignored. However, subsequent doctrine looks upon the earlier line as better or probably fairer and so receives such evidence, and this class of decisions is championed by the argument put forward by Cave, J., in Scott V. Sampson.[1] He said: "Speaking generally, the law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to recover damage for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would,' as is observed in Starkie on Evidence, 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed

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1) (1882) L.R.8Q.B.D. 491

thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential'. It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in the objection, which, however, is removed under the present system of pleading, which requires that all material facts shall be pleaded; and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good". This line of reasoning represents the present law not only in England but in other common law countries too, and it appears that the main gist in this argument is that a person should not be paid for the loss of that which he never had.

I will now like to consider briefly the relevant provisions of the India and Nigeria Law of Evidence. Sections 55 and 69 of the India and Nigeria Law of Evidence, respectively provide exactly the same as follows: "In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive is

relevant".

The provision above makes relevant only the character of the person claiming damages and not the other party - (the defendant); the character of the latter may also sometimes be relevant for determining the amount of damages. In an action of damages for defamation, evidence that the defendant was maliciously reckless for pure personal monetary gains is quite relevant in determining the quantum of damages; against him. However on the other hand, in action of damages for rape, evidence that the defender was a man of brutal and licentious disposition was held irrelevant.[1] And evidence regarding the defender's character has been held irrelevant in actions of damages for assault;[2] wrongous imprisonment;[3] breach of contract;[4] and in actions for seduction for a testamentary deed on the ground of facility, circumvention and fraud.[5]

I suppose it is worth mentioning generally that the class of suits in which damages are claimable and the amount of damages that are appropriate in different kinds of suits, are regulated by the laws under which such suits are brought. The damages awarded upon violations of a right are a remedy prescribed by the substantive law, and the kind of facts admissible in actions for damages vary according to the nature of the actions; is it for seduction, or breach of promise of marriage, or defamation, or adultery, and so on.

So under the English law, in an action for damages on account of adultery or for seduction of wife or daughter evidence of general bad character of the wife or daughter or particular acts of immorality or

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1) A V. B (1895) R. 402
2) See Haddaway V. Goddard (1816) 1 Mur. 148 at 151
3) Simpson V. Liddle (1821) 2 Mur. 579 at 580
4) Kitchen V. Fisher (1821) 2 Mur. 584 at 591.
5) Clarke V. Spence (1825) 3 Mur. 450

indecorum is admissible in mitigation of damages.[1] And in such cases what is really sought is compensation for the pain which the plaintiff had to suffer for disgracing his family and ruining his domestic happiness and so the damages should be commensurate with the pain which will vary according as the character of the wife or daughter has been previously unblemished or profligate.

In Hamlin V. Great Northern Railway Co,[2] it was observed as follows: "Generally speaking, the rule is this, in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and pain he has experienced as for instance, the extent of violence in an action of assault and many topics, and many elements of damage find place in an action for tort or wrong of any kind, which certainly have no place whatever in an ordinary action on contract". I would like to point out however, that such evidence is actually not admissible under section 55 or 69 of the India and Nigeria Law of Evidence respectively; but they are certainly admissible under other sections, e.g. the provision of section 12 of the India Evidence Act and its Nigerian equivalent, section 13. Section 12 of the India Evidence Act states that: "In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant".

A similar provision is contained in section 13 of the Nigeria Evidence Act which states that "In proceedings in which damages are

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1) Verry V. Watkins, 7 C. & P. 308
2) 1 H. & N. 408; 26 L.J. Ex. 20

claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant".

In actions for breach of promise to marry, the bad character of the plaintiff is clearly in issue. In an action of breach of promise of marriage the quantum of damages will be influenced by the amount of pain and injury to feeling caused to the plaintiff, but this in turn is dependent on the actual bad character of the plaintiff as to chastity, which may infact be used as an excuse too, for terminating the contract, - it is very material.[1] Also, if the plaintiff has been guilty of criminal intercourse with another, and such fact is unknown to the defendant at the time of the contract, he may prove it as a defence. The same is true if without his fault she becomes unchaste after the promise and if without the fault of the defendant, the plaintiff by her subsequent indelicate conduct injures her reputation, this may be shown in mitigation of damages.

It is also relevant in an action of breach of promise of marriage, to prove as a defence to the action that, unknown to the defender, the pursuer has had an illegitimate child, because on discovering the fact the defender may resile from the engagement.[2] But he would not be able to resile if he had always been in knowledge of her illegítimate child, I mean if she had intimated him with that fact and he still subsequently got engaged to her in clear knowledge of the facts as they were. If the woman had been seduced first under promise of marriage, the defendant cannot be heard to prove her bad character.[3] In an action for seduction, evidence of the bad

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1) Foulkes V. Sellway, 3 Esp. 236
2) Fletcher V. Grant (1878) 6 R. 59; Brodie V. Macgregor (1900) 8 S.L.T. 86
3) Walker V. McIsaac (1857) 19 D. 340

character of the person seduced is admissible in reduction of damages, but the evidence must refer to a time prior to the seduction;[1] and in such actions one element of damage is the wounded sensibility of the injured party and another is the loss of society of the daughter or wife; both should affect quantum of damages.

In libel cases, general evidence of plaintiff's bad character is controlled by the provision of r.37 of Or. 36, R.S.C. (Rules of Supreme Court) which runs thus: "In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence".[2] Save for the use of the word 'is' instead of 'shall' as in r.37 of Ord. 36, R.S.C., this rule is reproduced in section 70 of the Nigeria Evidence Act, word for word. In Hobbs V. Tinling,[3] the defendants did not justify but gave notice of facts in mitigation, under Order 36, r.37 (now Order 82, r.7). The plaintiff, when giving evidence in chief, deposed without objection not only to his general good reputation, but also to specific facts from which his good reputation could be inferred. He was cross-examined as to specific incidents not mentioned either in the

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1) Verry V. Watkins, 7 C & P. 308
2) Now Ord. 82 rule 7
3) (1929) 2 K.B. 1

alleged libel or in the particulars given in the notice. It was held that the cross-examination was admissible as going to credit, ie, to shake the witness's credibility as to other matters deposed to by him, but not in mitigation of damages, and consequently no evidence was admissible to rebut his denials.

In Scotland, there is a practice which application is similar to the requirement of r.37 of Or.36, though not exactly the same as the 7 day limit is not required. A few cases would illustrate the practice, which simply is that the defender may not prove the truth of the slander complained of, even in mitigation of damages, without a plea and counter issue of veritas. In Andrew Paul V. Thomas Jackson,[1] which was an action of damages for written slander, the writings complained of being letters accusing the pursuer of having used murderous threats against the defender, the writings were admitted, and it was stated in defence that the pursuer had on various specified occasions, used violent and abusive language concerning the defender, threatning him with bodily harm, which induced him to write the letters complained of, but no issue of veritas convicii was taken. The court held that the defender was debarred from leading evidence in proof of his statements to show provocation, and in mitigation of damages, as such evidence could not, in the circumstances, be distinguished from that of the veritas convicii.

Also in Rev. John James Browne and others V. John McFarlane,[1] where in an action of damages against the publisher of a Scottish newspaper

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1) (1884) 11 R. 460, see also McNeill V. Rorison (1847) 10 D. 15 L.J-Cl. Hope at 34; L. Moncrieff at pp 26, 27;
2) (1889) 16 R. 368.

for slander contained in a paragraph published in it, the defender stated in evidence that he received the paragraph from his regular correspondent in Ireland, whose name he refused to disclose. He proposed to lead evidence of the circumstances which might have affected the writer, but of which the defender was ignorant, with a view to mitigation of damages (there being no counter issue of veritas) in proof of an averment as to the circumstances in which the paragraph was written, of which admittedly he knew nothing. The evidence was disallowed by the court.

I suppose it should be pointed out that Or.36 r. 37[1] has not altered the common law as laid down in Scott V. Sampson,[2] with reference to the admissibility of evidence of the plaintiff's bad character in mitigation of damages in an action of libel, and Mangena V. Wright,[3] is a good confirmation.

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1) Rules of The Supreme Court (1883)
2) (1882) 8 Q.B.D. 491
3) (1909) 2 K.B. 958

(b)

RUMOUR AS AFFECTING DAMAGES

In seeking to mitigate damages by showing the plaintiff's reputation to be susceptible of little or no injury, the defendant will sometimes attempt to attain his purpose by showing less than a total lack of reputation for general character or for the particular trait. If for instance, the charge was that the plaintiff stole a horse, the defendant, will offer to show that there was a prevalent rumour or a common belief that the plaintiff stole the horse; thus the defendant will assert, his false charge could not have hurt the plaintiff by causing a belief in his guilt, because there was already a common belief in it, or at least a rumour of it. The argument for permitting this was well put in the following passage from the dissenting judgement of Pigot C. B. in the case of Bell V. Parke,[1] when he said: "It is by putting extreme cases that the application of a principle can often be most clearly tested; let me put the case that I shall now describe. Suppose this to have happened: a gentleman employed in a railway office is found in the office murdered, and circumstances of the very strongest suspicion attach upon one individual; the case is tried, the facts are fully investigated, the individual is acquitted; but there exists generally, in the community at large, a moral conviction that the party charged is guilty... He is entitled to the benefit of his acquittal, and to the presumption of innocence which the law casts round one whose guilt has not been proved; no man can be justified in

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1) (1860) 11 Ir.C.L. 413, 425

calling him a 'murderer', - nay, the general impression may, if the truth were clearly known, be unjust. But, rightly or wrongly, he has lost his good name, and there exists a general reputation that he was guilty of the specific offence which I have described..... Is it just or reasonable that a man so covered with the reputation of having been guilty of an atrocious crime should be entitled to as large a measure of damages, for being called a murderer, as a person of unblemished fame, upon whose character the breath of slander had never been blown?.... Suppose two successive cases presented in succession to the same jury; in one, the alleged murderer is plaintiff, in the other the plaintiff is a man without a stain upon his character; I do not think it just or reasonable (and I cannot think that it will ultimately be established as the Law of England) that the same measure of damages should be awarded to each".

But, on the other hand, there are grave objections to permitting such a practice[1] as suggested above, and on the balance the better practice seem to be that, which requires the exclusion of such evidence, and this is the result in the great majority of jurisdictions. The difficulty is, however, to draw the line between a mere rumour of the particular act charged and a general loss of reputation as to the particular trait involved in it, for the latter is received in most jurisdictions. In King V. Root,[2] where the libel had charged the plaintiff with being in a state of beastly intoxication, and it was held that mere rumours of the act charged were inadmissible, while a

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1) See Fitzgerald, B., in Bell V. Parke, (1860) 11 Ir.C.L. 413, 420
2) (1829) 4 Wend. 139 (New York)

bad reputation for excessive intoxication would be admissible. So far, then, as rumours of the sort have in effect destroyed the plaintiff's reputation to a real extent, it is proper enough to receive them; for this is only saying what all concede, that his reputation may be shown. But the distinctions drawn and the phrasing used in the various decisions and jurisdictions differ considerably.

In England, prior to the decision in Scott V. Sampson,[1] the defendant was allowed, in mitigation of damages, to adduce evidence that, prior to the defamatory statement complained of, there were rumours to the same effect as the statement complained of. This evidence was admitted on the theory that, if people were saying these things about the plaintiff in any event, he had received little injury. The reception of such evidence goes back to the case of Leicester V. Walter,[2] a case involving a libel issue, and the right to dispute the damages under the general issue being conceded. Mansfield, C.J., received evidence of "a general suspicion of plaintiff's character", "general rumour", "to show that he could receive little injury", "provided the reports got into many men's mouths". This decision appears to have followed an earlier unreported case of Eamer V. Merle, decided but Lord Ellenborough, C.J., in which the damages upon a slander charging insolvency were mitigated by "rumours in circulation" to the effect. The subsequent treatment of the subject is well analysed by Cave, J., while summing up the cases in Scott V. Sampson,[3] he said: "While such evidence appears to have been admitted by Lord Ellenborough, C.J., in Eamer V.

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1) (1882) L.R. 8 Q.B.D. 491
2) (1809) 2 Camp. 251
3) (1882) L.R. 8 Q.B.D. 491

Merle (unreported) and by Cresswell, J., with the approbation of Wightman, J., in Richards V. Richards,[1] and while its admissibility was supported by Pigot, C.B., in Bell V. Parke,[2] it was doubted by Abbot, C.J., in Waithman V. Weaver,[3] and by Coleridge, J., in Nye V. Thompson,[4] and it was held inadmissible by Fitzgerald and Hughes, B.B., in Bell V. Parke,[5] and by the whole court of Exchequer in Jones V. Stevens;"[6] he then mentions Leicester V. Walter,[7] as an early ruling of a peculiar sort. The only case omitted by the learned judge is Anon V. Moor,[8] which received "reports in the neighbourhood". In any case, it was in Scott V. Sampson,[9] that it was finally decided that evidence of such rumours was inadmissible. And the relevant passage of Cave, J's, judgement which settled this rule of exclusion in England, is in the following words: "It would seem that such evidence (rumours and suspicions as to the truth of the charge made by the defendant) is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have infact affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumours and suspicions is to give anyone who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending proceedings, what he may have picked from the most disreputable sources and what no man of sense who knows the plaintiff's

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1) 2 Moo. & Rob. 557
2) 11 Ir.C.L.R. 413
3) 11 Price 257 n
4) 16 Q.B. 175
5) 11 Ir.C.L.R. 413
6) 11 Price 235
7) 2 Camp. 251
8) 1 M & S. 284
9) (1882) L.R. 8Q.B.D. 491

character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who has started them"; so a question to a witness, whether he had heard anywhere the story which was the libel in question before he saw it in the defendant's journal was excluded.

This decision was affirmed by the House of Lords in Plato Films Ltd. and others V. Speidel.[1] Lord Denning buried rumour once and for all with the following eulogy: "Rumour is a lying jade, begotten by gossip out of hearsay and is not fit to be admitted in a court of law".[2] This has always been the view in Canada[3] and the United States[4] too, and other common law countries.[5]

The position in Scotland however, appears to be different in view of the decision in Macculloch V. Litt.[6] This was an action of damages for verbal defamation, imputing to the pursuer, criminal, or at least improper intercourse with a Mr Armstrong who had died several years previous to the occasion of the libel. One of the witnesses adduced by the defender was asked: Was there a report of a former improper intimacy between Mrs Macculloch and Mr Armstrong? On which the court ruled that, although no issue of justification had been taken, that it was competent to ask a witness that the answer could be founded on, not as an answer to the action, but merely as enabling the jury to assess the amount of damages.

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1) (1961) 1 All. E.R. 876
2) Ibid at 888
3) McCregor V. McArthur (1885) 5 U.C.C.P. 493
4) Sun Print & P. Ass'n V. Schenck (1900) 40 C.C.A. 163, 98 Fed. 925
5) Englishman V. Lajpat Rai, 37 C. 760: 14 C.W.N. 713
6) (1851) B D. 960

In the words of Lord Wood,[1] "This point must be decided according to the light of our own law. There is no issue in justification to prove the truth of the statement. Therefore, if this evidence is going to prove the truth of the statement, it must be rejected; and even if there were an issue in justification, it does not appear to me that the defender can prove the truth of the statements by proving the existence of a former rumour. The defender, however, does not desire this. She disclaims all attempt to prove the truth of the report. She merely wishes to prove that, at the time, the scandal was generally and currently reported. She does not propose to prove a separate fact, but merely that there was a current report. As far as I can judge, the question is admissible; and I believe there is a series of decisions of the jury court, to this effect. I do not see the later English authorities are against this view. We have no evidence that such a question is inadmissible when it is put, as here, for the purpose of enabling the jury to judge what amount of damages they should give. It does not appear to me to be irrelevant to prove that what Mrs. Litt said was a current report. I am not to be held as admitting it as an answer to the action, but merely in mitigation, with the view to enable the jury to assess the damages".

I am not sure if a Scottish court will take the same view today especially as the English courts from where Lord Wood appeared to have drawn support for his view have decisively rejected the admissibility of rumour in the later case of Scott V. Sampson[2] as confirmed

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1) Ibid
2) (1882) L.R. 8 Q.B.D. 491

in Plato Films Ltd V. Speidel.[1] It is however, true that at the time of his decision, the tenor of English authority admitted such evidence in mitigation of damages. However, it is interesting to note that in the earlier case of McNeill V. Rev. Gilbert Rorison,[2] the Lord Justice Clerk did say about the facts of the case that: "So far as reports or rumours are concerned, I apprehend that no question was raised, either in the letters or in the record, or at the trial. But if such had been the point, I think the evidence would, in this case, have been wholly incompetent".

In H V. P[3] in an action of damages for slander brought by a married woman against a man who had in a letter to her stated that she had committed adultery with him, the defender pleaded veritas. The defender stated that the pursuer had also committed adultery with "A" and had allowed "B" and "C" to take indecent familiarities with her. He did not mention on record the names of A, B, and C, but sent the names and addresses to the pursuer's agent.

The court, affirming the judgement of Lord Ordinary, Pearson held that the defender's statements in regard to third parties were irrelevant.

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1) (1961) A.C. 1090
2) (1847) 10 D. 15
3) (1905) 8 F. 232.

3 CHARACTER OF THE ACCUSED IN CRIMINAL CASES

(i) GOOD CHARACTER

In criminal cases, general evidence of good character of the accused is always relevant and admissible in favour of the accused, though general evidence of bad character is not admissible. Such evidence of good character might be given by witnesses for the prosecution in cross-examination or by witnesses called by the defence, and now in addition the accused himself may give evidence on oath of his own good character. It should be remembered that at a time the accused was not a competent witness on his own behalf, but even then, evidence of his good character was always admissible. And earlier views, before the accused was a competent witness for the defence, were that such evidence was admitted as an act of indulgence.[1] However, since the accused became a competent witness on his own behalf, it cannot be said that evidence of good character is admitted as a matter of indulgence but on policy, since evidence of his bad character can be given in return.

Section 53 of the India Evidence Act,[2] aptly provides that: "In criminal proceedings the fact that the person accused is of a good character is relevant"; and section 67 of the Nigeria Evidence Act[3] contains exactly the same provision. The implication of this provision, or rather the inference that can be drawn from the provision is that, the accused's good character may always be proved for the defence; this interpretation clearly conforms with the generally accepted common law rule in England and other

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1) Stephen, H.C.L., i, 449 (History of The Common Law of England)
2) 1872 Act (Evidence)
3) 1945 Act (Evidence); Cap. 62, Laws of the Federation of Nigeria

jurisdictions,[1] where it is generally agreed that the accused may produce evidence of his good character. However, one thing the Act does not indicate is the purpose for which such evidence of good character is relevant, and neither is the purpose defined at common law, and this has generated a lot of thought and debate. The uncertainty of the purpose of evidence of good character gives rise to an important questions which has to be answered, and it is this: how far is the good character of an accused person a defence in a charge against him for a criminal offence? In other words, if a person is charged with, and tried for, a criminal offence, and at the end of the case for the prosecution, assuming that a prima facie case has been made out against him, he alleges that he is a person of good character and substantiates that allegation by evidence acceptable to the court that he is a person of the good character so alleged by him, is he entitled to be discharged and acquitted? Simply put, the proposition is whether or not the good character of an accused can be used as a defence to criminal liability, but I believe the first question and as a matter of fact, a more important question to be answered should be, what is the actual purpose for which such evidence of good character is relevant. The former question is dependent on the latter, if the latter is ascertained and adequately answered, then the former can be easily answered. Though these questions come directly to mind, under the consideration of the Act, they equally arise at common law, and so it becomes pertinent to look

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1) See Dickson, Evidence (3rd edition). Para. 15; see also Slater V. H.M.A.(1928) J.C. 94 at 105.

for authority or guidance in the English legal system, since it is the parent legal system for most of the others, particularly those in the Commonwealth.

It is clear as earlier mentioned that in criminal cases[1] the accused is, on grounds of humanity, and for the purpose of raising a presumption of his innocence is allowed to prove his general good character (though not specific instance thereof) either by cross-examination of the witnesses for the prosecution, or in chief by his own testimony or that of independent witnesses. If however, the presumption arising from the evidence of previous good character be set up by the prisoner, it is competent to neutralise its effect by the cross-examination of his witnesses, either as to particular facts,[2] or as to grounds of his belief for the purpose of discrediting their testimony and it is competent to repel such evidence by calling witnesses to give evidence of the prisoner's general bad character. However, it should be mentioned that up and until the beginning of the 1800's, it is true to say that the admissibility was not recognised in the absolute form as it is today; today, evidence of the accused's general good character is admissible in all prosecutions whether for felony or misdemeanour,[3] but before there were two well understood limitations, both based apparently on considerations of probative value, but both now entirely abandoned.

First, and originally it was thought that character could be invoked in capital cases only. The jurists realised the inadequacy of such a rule and saw an urgent need for a reform. Mr T. McNally,[4] commenting

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1) See Phipson On Evidence (12th ed.) para. 528; Att. Gen V. Bowman, 2 B. & P. 532; Att-Gen. V. Radloff, 10 Ex. 84;
2) Reg V. Hodgkiss (1836) 7 C. & P. 298
3) Taylor, Evidence, s. 352
4) T. MacNally, 1802,Evidence, 320

on the original rule said: "It has been here-to-for held that a prisoner cannot examine to character, except 'in favorem vitae' when charged on a capital indictment; but the rule is now wisely extended to all cases of misdemeanours. And this appears to have been the ancient practice. In R V. Brown (1798)..... the point appears finally settled.... Lord Carlton, C.J.C.P., said he had conversed with many of the judges on the subject now before the court, who thought as he did that... evidence of such a nature might be very material; e.g., suppose a man of very great property was indicted for perjury, where the object to be attained by the perjury was a mere triffle, for instance a shilling; or suppose a man to be charged with a riot or assault, who was known to be of peaceful and quiet disposition; evidence of character in such cases directly encountering the nature of the charge in the indictment must be of the last importance... Lord Kilwarden, C.J.K.B., agreed with Lord Carlton, and observed that the reason generally assigned for the admission of such evidence in capital cases was altogether unsatisfactory to his mind. It was said to be 'in favorem vitae', but he had no conception, according to the principle of sound sense and right reason, that character could be evidence in a case affecting the life of a man, and yet not evidence in a case affecting his freedom, his property and his reputation".

Also, criticising the old rule of limitation to capital offences, and at the same time making an argument for an extension of the rule, Parsons C.J., in Comm V. Harding,[1] was of opinion, "that a

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1) (1807) 2 Mass. 317

prisoner ought to be permitted to give in evidence his general character in all (criminal) cases; for he did not see why it should be evidence in a capital case and not in cases of an inferior degree. In doubtful cases, a good general character should be admitted on behalf of the defendant in all criminal prosecutions; but they were clearly of opinion that it might be admitted in capital cases, in favour of life".

As I pointed out earlier on, it is now well established and understood that evidence of good character of accused is admissible upon charges of all grades, even in cases of misdemeanours.

It was also once thought that character was receivable in doubtful cases only, (and under no other circumstances) to turn the balance of evidence; this too like the previous is now obsolete.

A good illustration of this practice is found in Lord Ellenborough C.J., speech to the jury in Davison's Trial:[1] "If you do not know which way to decide, character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward; because there is hardly anyone who has not at sometime maintained a good character.... If the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order to let character have its operation, the case must be reduced to that situation".

I would like to think that there is something more fundamental to the limitation of the admissibility of evidence of good character at

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1) (1808) 31 How. St. Tr. 217

all these times. With regard to evidence of good character, it is well to observe, in passing that there is no class of evidence requiring more careful scrutiny. Many persons are moved by a spurious feeling of compassion to give such evidence recklessly and in superlatives. A man who knows very little about the person to whose character he testifies will give him a eulogy which might well be the envy of the unconvicted part of the population, and will think that he is merely discharging a duty of charity in so doing. The following shrewd observation comes down to us from L.C.J. Hyde, in Turner's trial[1]: "The witnesses he called in point of reputation, - that I must leave to you (the jury). I have been here many a fairtime. Few men that come to be questioned but shall have some come and say, 'He is a very honest man, I never knew any hurt by him' But is this anything against the evidence of the fact?" It appears the correct import of this statement is that when the evidence against the accused is such as to clearly establish his guilt, no importance can be attached to evidence of good character.

However, if one could explain, as the possible rationals for the limitation of the admissibility of evidence of good charcter as seen in the old cases, as being a direct result of the fear of unreliability of such evidence, which is now a generally doubtful or untrustworthy reason, it then comes as a surprise that some cases could have been decided this century, seemingly acknowledging and applying this supposedly obsolete rules. A good example of this is, R V. Broad-

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1) (1664) 6 How. St. Tr. 565, 613

hurst, Meanley, and Bliss Hill.[1] In this case, the appellant Bliss Hilll, a practising solicitor, together with two others, Mary Broadhurst, and Theresa Meanley was indicted for having uttered a forged will knowing the same to be forged, with intent to defraud. They were also indicted for conspiracy to utter the forged will in order to prevent the due course of law and justice in the probate suit in which they were plaintiffs. All the appellants were convicted. The appellant appealed against his conviction and sentence, which was one of three years' penal servitude, appeared before the court of Criminal Appeal in person and argued his appeal thus, inter alia: "I am a solicitor and I have practised in Wolverhamption for many years..... The judge at the trial in his summing up misdirected the jury in several instances on the facts and on the law, and did not sufficiently direct them on certain matters. He was wrong in directing the jury to consider the evidence in the case as affecting me apart from that of my character and reputation, and not directing them to have regard to my proved character for life-long rectitude and integrity as affecting the credibility of my evidence, and the probability of my knowingly doing anything wrong and to have regard to the especial ruinous consequences to me as a solicitor of knowingly making myself a party to an offence. Evidence of character should always be submitted to the jury with other circumstances of the case to enable them to come to a decision on the whole of the evidence.[2] Avory J., did not leave the evidence of my character to the jury in this free way but qualified it by telling them that it could only be taken into

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1) (1918) 13 Cr. App. R. 125 at p. 127
2) Russel On Crime, (7th ed.) p. 2119

consideration if the remainder of the evidence left them in doubt".

The passage in the learned trial judge's summing up to the jury reads thus in part[1]: "If the evidence leaves you in doubt whether this charge is brought home to him, you are entitled to take into consideration the character which he has hiterto borne. You are entitled to take into consideration in the sense that you may say to yourselves it is unlikely that a man of such a character, of such a reputation, would commit such an offence".

Darling J., giving the judgement of the court of Criminal Appeal which dismissed the appeal said, inter alia[2]: "It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for consideration; but that when they entertain any doubt of the guilt of the party, they may properly turn their attention to the good character which he has received... The history of the admission of good character, as given in Stephen's History of the Criminal law of England, shows that such evidence does not stand on precisely the same plane as that concernig the relevant facts going to prove or disprove the issue".[3]

In a similar decision, Martin J., in Rex V. Riopel,[4] said: "... Did the honourable judge presiding at the trial err in law and in fact when he rejected completely the evidence of good character made

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1) (1918) 13 Cr. App. R. 125 at 128
2) Ibid at 128 - 129
3) R V. Davison (1808) 31 St. Tr. 216, Per Lord Ellenborough C.J; R V. Frost (1839) 4 St. Tr. (N.S.) 85
4) (1923) 2 D.L.R. 1155, 1159 (Canada, Quebec)

by the accused?" He continued by answering, "The trial judge did not tell the jury that they were to reject completely the proof of good character made by the accused. He distinguished by example cases where evidence of good character had more weight in one case than in another and told them that he admitted that in certain cases when the proof was not sufficiently positive for the jury to find the accused guilty, evidence of the good reputation of the accused in such circumstances had weight, but he pointed out that in the present case if they reached the conclusion that the accused had committed the crime charged against him, they would so find, no matter how good his previous reputation had been. I would answer this question in the negative".

I agree that in forming a judgement as to a prisoner's intention, evidence that the party has previously borne a good character is often highly important, but I must say that I am not convinced as most of the foregoing dicta would want us to be, that the only time evidence of good character is admissible, is if there is a nearly even balance, and in such situations it should make it preponderate in the accused's favour. This is well put by Lord Ellenborough in R v. Davison,[1] when he said: "Evidence of character is only of weight where the other evidence is in even balance, or where there is a fair and reasonable doubt of the prisoner's guilt". I do not agree with this, and Wigmore,[2] is also of the opinion that the broad rule now being that accused's character is "always admissible" in criminal cases, the above limitations do not exist. And one important point

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1) (1808) 31 How St. Tr. 217
2) Wigmore On Evidence, para. 56

against the limitation that the jury must be directed only to consider evidence of good character if in doubt is that, if they are in doubt, the proper thing they should do is to acquit.[1] Another important point which should be borne in mind is that, it has been held that, where evidence of good character has been given, there is no rule that the judge must refer it in his summing up.[2]

In recent times, emphasis has shifted, as there are largely two main prevalent views now, with regard to the purpose for which evidence of good character is relevant. The first is that evidence of good character goes only to credit of the defendant as a witness, and the other is that, it might actually go further than that; that its main purpose is to cast doubt on the case for the prosecution, by showing that the defendant is less likely, because of his character, to have committed the offence. There seems to have been a sort of rivalry for recognition one over the other between these two views, and it is only recently that a clear judicial preference appears to have emerged in favour of the latter view. But before going into all the arguments about that, I wish to point out that there is a difference between the present consideration of using good character to cast doubt on the prosecution's case, and the old limitation to its admissibility, when it was used only to tilt the balance when the decision could have been a hung one. As earlier pointed out, I disagree with this, and as I mentioned earlier , I agree that in forming judgement as to a prisoner's intention, evidence that the

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1) R V. Brittle (1965) 109 Sol. Jo. 1028; (1966) Crim. L.R. 164
2) R V. Smith (1971) Crim. L.R. 531

party is of good character may be useful, and that is the actual purpose it is supposed to serve under the mordern principle. I will like to point out that the need to make this distinction is as a result of fear that they may be confused with one another. This anticipation is reinforced by the confusion, arising from the language of Tindal L. C.J., in R V. Frost;[1] in this case he said that:

".....if the evidence which goes to the fact is sufficiently strong to convince you that the act of criminality which is imputed to him was actually committed, then it is no more than weighing probability against fact. If the scales are hanging even and you feel a doubt whether the party is guilty or not of the act charged against him, then undoubtedly you will give him the full benefit of such testimony of general character which he may have earned by his previous conduct in life. Gentlemen you are to weigh it not as direct evidence in the case - not as positive evidence contradicting any that has been brought on the other side - but as testimony, probably, to induce you to doubt whether the other evidence is correct, and not to discard that evidence if you think that it is so". This dicta certainly belongs to the old already discussed class of cases. However, its relevance here now, is that, it appears to me that Tindal C.J., has inexpicably and inadvertently confused the old and the modern use of evidence of good character, this results from the way he couched the tail end of his statement, but there is no doubt that his Lordship clearly favours the old limitation on the admissibility of good character - only when the jury is in doubt. The troubled part of his

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1) (1839) 4 St. Tr. (N.S.) 85; (1840) Gurney's Rep. 749

statement is where he said that: "...but as testimony, probably, to induce you to doubt whether the other evidence is correct,...." This appears to me to be the 'improbability' doctrine - whereby the accused adduces evidence of his good character to induce the jury to think that he is unlikely to have committed the offence, this will shortly be discussed in detail. This is incongruent with the earlier part of his statement that: "... If the scales are hanging even and you feel a doubt whether the party is guilty or not of the act charged against him, then undoubtedly you will give him the full benefit of such testimony of general character....", in such cases evidence of good character is of no help or use unless there is some legitimate doubt as to the guilt of a person. In the present modern use, which is to be considered, the reasonable operation of such evidence is to create a presumption that the party was not likely to have committed the act imputed to him.

Going back however to the original matter, I suppose it will always be relevant, if we have the task of proving that A committed an act, to show that he is the kind of man who is likely to act in such a way or otherwise. Before going futher, I will like to make a fleeting mention about the question of relevancy of evidence of good character, since it may be doubted whether good character is usually any more relevant in criminal than in civil proceedings. As Lush J., observed in Hurst V. Evans:[1] "As I pointed out during the argument, evidence of good character, though not revelant in either civil or

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1) (1917) 1 K.B. 352, 357

criminal cases, is always admitted in a criminal case". Willes, J., seems to think differently with regard to the relevance of character, and I quite agree with his view in R V. Rowton,[1] when he said of character that: "It is strictly relevant to the issue, but it is not admissible upon the part of the prosecution, because, as my Brother Martin says, if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and as has been witnessed elsewhere, upon trial for murder you might begin by shewing that when a boy at school the prisoner had robbed an orchard, and so on through his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted on that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity...." This statement though is actually concerned with bad character, is ironically applicable to that of good character in two ways. First, I believe that evidence of good character of an accused is relevant, and secondly, unlike bad character, it is received for reasons of policy and humanity, that is for the same reason, it is claimed that bad character is excluded. Its relevance must depend on the assumption that the accused usually acts 'in character'.[2] The basic premise is the one by which we order our lives, that people generally act in keeping with their character. For instance, that a thief will often steal, but an honest man usually will not. It is exactly on this point that the modern notion of the purpose of evidence of good character is based. It is argued

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1) (1865) Le. & Ca. 520, at 540 - 1; 169 E.R. 1497
2) Nokes, An Introduction to Evidence (4th ed.) at 138

that character being thus relevant, it follows that a defendant may offer his good character to evidence the improbability of his doing the act charged, unless their is some collateral reasons for exclusion, and the law recognises none such.

The above point that relevance depends on the assumption that the accused usually acts 'in character' is well illustrated by the interesting case recorded by Professor Kenny.[1] He recorded that at a charity bazaar at Lincoln, about 1900, when an alarm was raised that a purse had been stolen, the thief slipped it into the coat pocket of a bishop who was present; but any suspicions that might have been aroused by it being found in his pocket was effectively rebutted by the episcopal character of the wearer.

This illustration, effectively shows, the sort of purpose that the evidence of good character would serve, and the illustration strenghtens the argument of those who say that the purpose of evidence of good character is to cast doubt on the prosecution's case by showing that the accused is less likely to commit the offence because of his character. The imperative question was raised in R V. Shrimpton[2] by Alderson, B., he said: "You say he is not likely to have committed this offence because he is a man of good character; then in answer to that, they say he is likely, because he is not a man of good character". Campbell C.J., in the same case said: "The question in issue is the good character of the prisoner - whether or not he was likely to commit the offence of which he was charged". In

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1) Kenny's Outline of Criminal Law at § 612
2) (1851) 5 Cox 387

R V. Rowton,[1] Willes, J., said: "It is a mistake to suppose that because the prisoner can only raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true; it is strictly relevant to the issue".

In R V. Stannard,[2] Patterson, J., observed as follows: "I cannot in principle make any distinction between evidence of facts and evidence of character: the latter is equally laid before the jury as the former, as being relevant to the question of guit or not guilty: the object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case".

A strong support has also come from Strong, J., in the American case of Canceni V. People,[3] where he said: "The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it to do an act so inconsistent with it. Such a person may be overome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the rule is otherwise. The influence of this presumption from character will necessarily vary according to the varying

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1) (1865) Leigh & C. 520, 540; 10 Cox C.C. 25
2) (1837) 7 C. & P. 673; see also Attwood V. R (1960) 102 C.L.R. 353, 359; s. 412 of the New South Wales Crimes Act expressly provides that evidence of character is always evidence on the question of guilt.
3) (1858) 16 N.Y. 506

circumstances of different areas".

In another American case of State V. Lee,[1] Berry, J., said: "The purpose of the evidence as to character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit and therefore did not commit, the crime with which he is charged".

In the Canadian case of R V. Barbour,[2] Duff, C.J., said: "....a much wider latitude is allowed the accused, who may adduce any evidence of good character, for example, tending to show, not only that it was not likely that he committed the crime charged but that he was not the kind of person likely to do so".

My main purpose of citing these cases, is not just for novelty, but to bring together decisions from a number of different jurisdictions with a serious view of showing that not a single one of the variety made any mention of character as a means of impeachment of defendant's credit, but they are all united in very clear terms on one view, which is, the probability or improbability of the accused being the perpetrator of the offence charged. It is also important to note that most of the cases cited were actually decided in the last century, thus showing that the 'probability or improbability' doctrine dates back for a long time, and it indicates its general popularity. So, one can say that it is generally agreed that the accused in all criminal cases may produce evidence of his good character as substantive evidence of his innocence. In the court

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1) (1876) 22 Min. 409
2) (1938) 71 C.C.C. 1 (S.C.C.) at 20; See also R V. Letain (1918) 29 C.C.C. 389 (Man.C.A.); R V. Carlin (No. 1) (1903) 6 C.C.C. 365 (Que.K.B.); R V. Britnell (1912) 20 C.C.C. (ont.C.A.) 85 at 87.

room parlance this is often termed as "placing his character in issue", but the phrase is misleading. Character is almost never one of the ultimate issues or operative facts determining guilt or innocence; it is merely circumstantial evidence bearing on the probability that the accused did or did not commit the act charged with the required guilty intent.[1]

I certainly cannot see case of those who argue otherwise, that is that evidence of good character is meant to go to the credit of the accused - being presented as strongly as the former viewpoint. Sir James Stephen[2] apppears to attempt to buttress this viewpoint when he put forward some credible argument to the effect that: "Evidence of character is, generally speaking a make-weight, though there are two classes of cases in which it is highly important: 1/ Where conduct is equivocal, or even presumably criminal. In this case, evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of any such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed. 2/ When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault by a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused would be of great importance".

Though Stephen appears to be more concerned in his statement above,

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1) See Commonwealth V. Beal, (1943) 314 Mass. 210, 50 N.E. 2d 14; State V. Micci (1957) 46 N.J. Super 454, 134, A. 2d 805; Morrison V. State (1965) 217 Tenn. 374, 397 S.W. 2d 826
2) Introduction to Evidence pp. 167, 168

with the issue of importance of character evidence, especially with regards to its probative value, and not specifically with the issue of its effects on or use by the jury it is undoubtedly a helpful and sound argument for those who see the purpose of admitting evidence of good character as being to determine the probability or improbability of the accused committing the offence.

The controversy was squared up in open confrontation in the case of R V. Bellis.[1] B, was convicted of possessing explosives. He appealed on the ground, inter alia, of misdirection as to the significance of his previous good character in that the judge after saying that it was not a ticket to an acquittal continued: "but it is something which you must take into account in his favour really on the basis that a person of good character is less likely to commit this type of offence than a man of bad character". It was argued on appeal that the proper direction was that possession of good character makes the accused testimony more worthy of belief than that of a man of bad character, and that the statement should have been directed to the credibility of the appellant rather than to suggest that possession of the good character made it less likely that he would commit that type of offence. The court of criminal appeal expressed the opinion that evidence of good character goes primarily to the credibility of the accused, but added that, a direction that evidence of character was to be taken into account as something rendering the commission of the crime by the accused less likely, was if anything,

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1) (1965) 50 Cr. App. R. 88; (1966) 1 All. R. 552

more favourable to the accused than a direction that the jury should consider the evidence of character as something affecting the credibility of the accused. The view of the court is articulated in the view of Widgery, J.,[1] who dismissing the appeal said: "Although ..... there is no formal or standard direction in these terms, this court does take the view that possession of a good character is primarily a matter which goes to credibility, but it is to be observed that the direction actually employed in this case ..... is certainly not less favourable to the appellant, because, logically, if he directed them that the appellant was more credible by reason of his good character, it would have followed from that that he was less likely to have committed the offence".

With respect, the proposition stated by the trial judge seems, to me, to be entirely correct. The reasons are not far fetched; apart from the impressive arguments which I have already discussed, long before the accused was entitled to give evidence (and so before his credibility could be an issue before the jury) it was well settled that he was entitled to introduce evidence of his good character. This could only be on the grounds that the jury were entitled to take into account as making it less likely that the accused committed the crime. I have already cited and quoted from numerous old cases which clearly establish this point.[2]

These decisions were taken as having been supplanted by the decision in R V. Falconer-Atlee,[3] in which the "credit only" direction was strongly affirmed. The logical result of the case was

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1) (1965) 50 Cr. App. R. 88 at 89 - 90; Cf R V. Callum (1976) Crim. L. R. 257
2) Stannard (1837) 7 C. & P. 673 per. Patterson J., Shrimpton (1851) 5 Cox. 387; Rowton (1865) 10 Cox 25
3) (1973) 58 Cr. App. R. 348 (C.A.).

that, if the defendant chose not to give evidence in his defence then evidence of good character elicited in cross-examination or given by character witnesses, would not be relevant for any purpose, and the jury should be directed to disregard it.

This consequence arose and was squarely faced by the trial judge in R V. Bryant and Oxley.[1] In this case the defendants were jointly charged with robbery. One defendant applied for leave to appeal against his conviction on the grounds that the trial judge had misdirected this jury in stating that evidence given of his good character went to credibility and, in the circumstances, had little relevance to the issue whether he had committed the offence. Watkins, J., giving the judgement of the court said: "If ..... as seems to be so the judge was intending to convey to the jury the impression that a good character is relevant only when a defendant gives evidence and, therefore, is a matter only to be taken into consideration when the credibility of what he and other witnesses have said is being assessed, he was being too restrictive about its possible uses. The possession of a good character is a matter which does go primarily to the issue of credibility. This has been made clear in a number of recent cases. But juries should be directed that it is capable of bearing a more general significance which is best illustrated by what was said by Williams, J., in R V. Stannard[2]: 'I have no doubt, if we were put to decide the unwelcome question, that evidence to character must be considered as evidence in the cause. It is evidence, as my

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1) (1979) Q.B. 108
2) (1837) 7 C. & P. 673 at 675

brother Patterson has said, to be submitted to the jury, to induce them to say whether they think it likely that a person with such a character would have committed the offence.....'.

We have no doubt that the omission to direct in this way in the present case could not possibly have had the effect of rendering the jury's verdict unsafe or unsatisfactory". The application was refused. This decision, which is the most recent seems to have settled the position the way I will like to see it. While it appears to show less sympathy for the use of evidence of good character as a means of determining the likelihood that the person to whom the character is attributed did or did not do an act alleged, at the same time it clearly acknowledges and gives more sympathy to the view that evidence of good character does go the credit of the defendant. At the present day, evidence of the accused's good character would be no less admissible because he did not give evidence. In such a case his credibility would not be before the jury but he would have a right that they should know of his good character and take this into account in deciding whether he committed the crime. Clearly good character is also relevant to the accused's credibility. Historically, this was not its primary purpose.

So, if I may now answer the first question on which we set out, that is, what is the purpose for which such evidence of good character is relevant; it is respectfully submitted that whether good character is a matter going primarily to credibility or to the accused's guilt must depend on the circumstances of the case and the

nature of the evidence of character tendered.

It is not unusual to plead good character in mitigation of sentence after an accused has been pronounced guilty. Norton[1] cites the case of an Irish judge who summed up thus: "Gentlemen of the jury, there stands a boy of most excellent character, who has stolen six pairs of .silk stockings", when evidence was given as to the good character of a boy who had been clearly found guilty of theft. In Scotland, however, the practice is to allow all evidence to go to the jury including that for mitigation of punishment.

In answering the second question whether or not the good character of an accused person can be used as a defence to criminal liability, I can safely say, that till today, the good character of an accused has a limitation to its use; its scope is clear. In criminal cases it is clear that a man's character is often a matter of importance in explaining his conduct and in judging his innocence or criminality.

Going back to that interesting illustration given by Kenny,[2], it follows that if a bishop should be caught in the act of "shoplifting", the episcopal character would merely appear to be unmerited; in other words, if the evidence of guilt be complete and convincing, testimony of previous good character cannot and ought not to avail;[3] and this has been realised from any early time that such evidence should be of no avail against credible proof of the offence.[4]

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1) Norton, Evidence, at p. 231
2) Kenny's Outline of Criminal Law at para. 612
3) R V. Broadhurst, Meanly and Bliss Hill, (1918) 13 C.A.R. 85, 125; (1918) 82 J.P. 194
4) Rex V. Davison (1808) 31 St. Tr. 99, 217; Reg V. Frost (1840) Gurney's Rep. 749; Rex V. Haigh (1813) 31 St. Tr. 1092, 1122; R V. Turner (1664) 6 St. Tr. 565.

Where the doing of the act is not in dispute, because conceded, it has been said that character no longer has any probative function, and it cannot be set up merely in excuse. In Drapers Trial,[1] a case involving criminal libel; to the question, "Do you think the defendant is capable or incapable of publishing any statement of facts of the truth of which he was not perfectly convinced?" The answer, "Perfectly incapable" was given. Commenting on this in his judgement, Lord Ellenborough said: "I cannot suppose you mean it for any other purpose than as going in mitigation of punishment..... It cannot be offered in the shape of a defence. Good God! because one man says a thing and because I may believe what he says,- am I at liberty to disseminate it all over the world? There is no colour for it. I receive this for the purpose of mitigation of punishment. If the fact of publication were doubtful, and if it were referred to a man (as defendant) who had such a character given to him, this would be evidence to go the jury in answer to the charge, and in that way it would be most material. Here you do not dispute that fact". Thus, it is clear from the foregoing dicta and other dicta in other cases, that the good character of the accused cannot be used as a defence to a case which has been properly "brought home" to him, "Whether, when admitted, it should be given weight except in a doubtful case, or whether it may suffice of itself to create a doubt, is a mere question of the weight of evidence, with which the rules of admissibility have no concern".[2]

In all cases, too, when evidence is admitted touching the general

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1) (1807) 30 How. St. Tr. 1018
2) Wigmore On Evidence, Para. 56.

character of the party, it ought manifestly to bear reference to the nature of the charge against him. So it is doubtful if evidence of good reputation for one type of conduct will be held relevant when another type of conduct by the accused is in question. For example, it is doubtful if a good reputation for honesty will be held relevant in a charge for assault; or in an offence involving fraud or dishonesty, whether the good reputation of the accused for sobriety or for being a total abstainer from alcoholic drinks or of being a quiet and unquarrelsome man - will be held relevant. On the other hand, I suppose this group of evidence will match each other, for instance, if he be accused of theft, that he has been reputed an honest man; if of treason, a man of loyalty. Such evidence must be general and not relate to particular instances.[1] Finally, the character proved must relate to a period proximate to the date of the supposed offence; for, as Lord Holt once remarked, in R V. Swendsen,[2]: "A man is not born a knave, there must be time to make him so; nor is he presently discovered after he becomes one".

(ii)

BAD CHARACTER

In discussing evidence of bad character of the accused, I would like to consider it, under two subheads, namely (a) bad character not in issue and (b) bad character in issue.

(a) Character Not In Issue

An attack by the prosecution, on the accused's character is genera-

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1) R V. Rowton, 3 4 L.J.M.C. 57

2) (1702) 14 How. St. Tr. 596.

lly inadmissible; in otherwords, the prosecution is generally prohibited from adducing at the first instance, evidence of the bad character of the defendant when offered merely to show that he is a bad man and hence more likely to commit a crime. In India, this common law rule is contained in section 54 of the Indian Evidence Act[1] which provides: "In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant". Just now, we shall concern ourselves with only the first part of the section which deals with the general inadmissibility of evidence of accused's bad character at first instance;[2] for example in Batasimani V. R,[3] the court held inadmissible, the opinion of an excise officer that an accused charged with illicit sale and possession of cocaine had the reputation of being dealer in cocaine on a very large scale. Section 68 (1) of the Nigeria Evidence Act provides that: "Except as provided in this section, the fact that an accused person is of bad character is irrelevant in criminal proceedings".

The position in Scotland is precisely the same as stated above, as clearly demonstrated by the case of Burns V. Hart and Young.[4] In this case, a woman, who kept a broker's shop, was tried before a sheriff and a jury, on a charge of theft, or reset of theft, and convicted of the latter crime. In the course of the trial, evidence was admitted that the panel was habite and repute a resetter, and on an appeal the conviction was set aside, on the grounds that this evidence was incompetent and ought not to have been admitted.

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1) This section was substituted for the original by section 6 of the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891).
2) R V. Behary, 7 W.R. 7; R V. Bykant Nath, 10 W.R. Cr. 17; R V. Kulum Sheikh, 10 W.R. Cr. 39; Mi Myin V R., L.B.R. 4: 2 I.C. 249; Phekan V R., A 1931, P. 345; 133 I.C. 449; R V. Gopal Thakur, 6 W.R. Cr. 72.
3) 53 C. 707: 30 C.W.N. 854. 4) (1856) 2 Irv. 571, and in Gaya V. R A 1946 O 233 it was held that a magistrate looking into the confidential police records of the accused and allowing his judgement to be influenced thereby violates the fundamental principles of criminal jurisprudence.

The position is no different in America, as eloquently shown by Peckham, J., in People V. Shea,[1] he said: "Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favours this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine..... . In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question". I must say that I find the above statement by Peckham, J., quite apt, especially the ingenius way it contrasted the common law adversorial system of justice with the continental inquisitorial system; and with this, one can say the rule is clear beyond argument. I will like to make one interesting allusion, with regard to how meticulous the judges may sometimes be in applying the rule. In R V. Flanagan,[2] the question before the court involved whether the accused was known by

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1) 147 N.Y. 78, 41 N.E. 508
2) (1945) V.L.R. 265

another name. The accused stated on oath that a certain document was signed by his wife. The signature at the foot of this document was "Nellie Hennessy". The trial judge, Lowe, J., refused to allow the accused to be cross-examined as to whether he had ever gone under the name of Hennessy as a suggestion that he had been living under an alias might suggest to the jury that he was a person of bad character.

This point was also emphasised in the Nigerian case of Lawal V. The State.[1] There the appellant was tried and convicted of murder by the High Court. Part of the evidence given by a prosecution witness against him reads: "I gave the accused and his friends money, because when you saw masquerades you would find these men behind them, at election campaigns you would find them there. I did this to avoid trouble. The accused persons and their friends are popularly known as 'Ohio boys'". In his closing address the prosecuting counsel invited the court to "take into consideration the character of the deceased and the accused person as revealed in evidence". One of the accused's grounds of appeal was that the court wrongly allowed evidence of the accused's bad character to be wrongly given. The Supreme Court of Nigeria agreed that the "evidence and the comment were undoubtedly of the most prejudicial kind" and held that even though there was certainly "evidence on which a jury properly directed would, have been justified in convicting the appellant of murder ..... by a grave error the prosecution called evidence showing that the appellant was a man of bad character, given to acts of violence,

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1) (1966) 1 All N.L.R. 107; See also Per. Blackall P., in R V. Osita Agwuna (1949) 12 W.A.C.A 456;

and cross-examined the appellant to the same effect, although none of the circumstances in which such questions are admissible was present". The accused had not put his character in issue by giving evidence of his good character or asking questions which tended to involve imputation on the character of the prosecutor nor did he give evidence against any other person charged with the same offence under section 159 (d)[1] and section 68 (2) of the Nigeria Evidence Act. On this ground alone, the conviction was quashed. Similarly in the Irish case of The People (Attorney General) V. Lehan,[2] the appellant was convicted of the murder of his wife. At his trial when he had given evidence in his own defence, counsel for the prosecution cross-examined him in order to show, (a) that he was a deserter from the U.S. Forces, and (b) that he had at different times assumed different names; although he had at no time put his character is issue. Maguire, P., in his judgement observed as follows: "The first point made was that the accused was cross-examined in a manner contrary to section 1 of the Criminal Justice (Evidence) Act, 1924 (Ireland)[3]. The objection was directed to certain questions included in the group of questions numbered 107 to 262 on the seventh day of the trial.... In view of the conclusions reached by this court it is not desirable to particularise further this objection. It was sought to justify this cross-examination by reference to the proviso, paragraphs (i) and (ii), contained in the section. In the opinion of this court the specified questions were irrelevant to any issue in the case and

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1) See s.1 (f) Criminal Evidence Act, 1898
2) (1947) I.R. 133
3) See s.1 (f) of The Criminal Evidence Act, 1898

tended in the eyes of the jury to prejudice the accused who had done nothing to deprive himself of the protection of the proviso".

From all that has been said, the rule can be described as firmly and universally established in policy and tradition that the prosecution may not initially attack the accused's character.[1]

It is however important to mention that a voluntary statement by the accused, which is admissible in evidence is not excluded merely because it incidentally betrays his previous bad character. A good illustration of this is, H.M.A. V. McFadyen:[2] here the accused was tried in the High Court of Glasgow, on a charge of attempted house-breaking. In the course of the cross-examination of a police officer, who was a witness for the crown, the Advocate Depute asked the witness the following questions: (Q) "At the police office, was McFadyen charged and duly cautioned?" (A) "Yes". (Q) "What did he say after being cautioned?" Counsel for the panel objected to the question on the grounds of the nature of the answer which would be given. He did not dispute that, as a general rule, it was competent to lead evidence as to a voluntary statement made by an accused person who had been duly cautioned, but he contended that it was incompetent where the statement involved the previous character of the accused, and where the question and answer constituted, to all intents and purposes, an attack upon the accused's character. He argued that it was settled law that the prosecutor was not allowed to lead evidence of previous bad character (except in special circumstances, not here in point) and what the crown was now trying

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1) See Downey V. State (1897) 115 Ala. 108, 22 So. 479; see also State V. Moelchen (1880) 53 Ia. 310, 313, 5 N.W. 186
2) (1926) J.C. 93

to do was to evade this rule of law. In his judgement, Lord Moncrieff held that evidence as to voluntary statement made by a prisoner to the police, after being cautioned, was admissible, although the effect of the statement was to indicate the previous bad character of the accused. The question was then put, and the answer was that the panel said: "The idea is ridiculous, it is big things I go in for".

A similar decision as in McFadyen's[1] case was recorded in Turner V. Underwood[2]. Here the defendant was charged before the justices with indecent behaviour in a railway carriage to the annoyance of a fellow passenger contrary to one of the bye-laws of the railway company. On complaint being made to a railway police sergeant, the accused after being duly cautioned made a voluntary statement in the course of which he said: "I have done time for this before". The whole statement was read out at the trial as part of the evidence for the prosecution. It was contended that the evidence of the defendant's having used those words was inadmissible as being tantamount to evidence of a previous conviction: (a previous conviction is relevant as evidence of bad character[3]). The court in its judgement held as follows; first, although as a general rule it was the practice in jury cases that where the court knew of something in a defendant's statement which admitted a previous conviction or which otherwise reflected on his character it would not allow that part of the statement to be read out to the jury, nevertheless it was not a rule of

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1) (1926) J.C. 93
2) (1948) 2 K.B. 284
3) R V. Winfield (1939) 4 All. E.R. 164; see also section 68 (4), Nigeria Evidence Act; section 54, Explanation 2 of Indian Evidence Act - see Post.

law that what a man said in relation to the charge was not evidence against him. Secondly, the evidence to which objection had been taken was relevant in as much as it showed that the defendant was admitting that his conduct was a deliberate act of indecency. Finally, as such the evidence was rightly admitted.

RATIONALE

The general rule having been properly stated, I think it would be appropriate to consider the reasoning or motivation behind the rule, recognising fully well that the relevancy of evidence of bad character has never been doubted and yet it is generally excluded. It has been said that this policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandon - the instinct of giving the game fair play even at the expense of efficiency of procedure. Even though it is arguable that the rule does not in any way inhibit the efficiency of procedure, and that as a matter of fact if anything, it enhances it, one thing can however not be denied, and that is that, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court, and this is something that must be strongly guarged against. It is incontrovertible that there is just as much probative value in the

argument, "A is quarrelsome, therefore he probably committed this assault", as in the argument, "A is peaceful, therefore he probably did not commit the assault;" and this is acknowledged in judicial opinion.[1] Here, however, a dotrine of Auxilliary Policy,[2] operates to exclude what is relevant, - the policy of avoiding the uncontrolable and undue prejudice, and possible unjust condemnation, which such evidence might induce.[3] Before going into the possible rationales of the rule, I would like to bring out clearly some of the delicate and dangerous problems the rule has managed to avoid, that way, we will appreciate better the reasoning behind this rule of evidence.

A good illustration of the impact of the use of evidence of bad character and its potentially prejudicial operation is illustrated in Camus' novel 'The Outsider'.[4] Meursault, a young French Algerian, was being tried for the murder of an Arab, whom he was alleged to have shot on the beach, outside Algiers. Coincidentally, the shooting took place a few days after his mother's death in an old age home. The court, as was the custom, saw fit to allow wide ranging character evidence to be admitted. The Warden and gatekeeper of the home gave evidence and Meursault recounts this court room scene: "To another question he (the warden) replied that on the day of the funeral, he was surprised by my calmness. Asked to explain what he meant by 'my calmness', the warden lowered his eyes and stared at his shoes for a moment. Then he explained that I hadn't wanted to see my mother's body, or shed a single tear, and that I'd left immediately

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1) See Ante
2) See Wigmore On Evidence, § 29a
3) The reasons for the rule were well and consisely put in a letter from the celebrated Dr. Parr to Sir S. Romily, in 1811 (Life of Romily, 3d ed., II 180); See also Wigmore On Evidence, § 57.
4) Penguin Modern Classics, 1971 at pp. 90 - 91

the funeral ended, without lingering at her grave. Another thing had surprised him. One of the undertaker's men told him that I didn't know my mother's age.....

The prosecutor was then asked if he had any questions to put, and he answered loudly: 'Certainly not! I have all I want'. His tone and the look of triumph on his face, as he glanced at me, were so marked that I felt as I hadn't felt for ages. I had a foolish desire to burst into tears. For the first time I had realised how all these people loathed me. After asking the jury and my lawyer if they had any questions, the judge heard the doorkeepers evidence. On stepping into the box, the man threw a glance at me, then looked away. Replying to questions, he said that I'd declinded to see my mother's body, I'd smoked cigarettes and slept, and drank cafe au lait. It was then I felt a sort of wave of indignation spreading through the court room, and for the first time I understood that I was guilty".

The character evidence in this illustration is quite unrelated to the issue, but the prejudicial effect is overwhelming. I unhesitatingly agree with Wigmore,[1] that it was perhaps because of this possible prejudicial effect on juries that for a period of time in English legal history the use of character evidence (essentially bad character) was in disrepute, epitomized by the abolition of its use in criminal cases.

In another book,[2] the author, Judge Wiglittle, talking in the light of experience, wittily demonstrates the problem the general rule has

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1) Wigmore On Evidence at p. 451
2) 'Ten Years a Police Court Judge', (1884) at p. 166

averted, with a strikingly typical conversation. The passage reads: "Take, for instance, an illustration of the uncasable crimes, the following: A man has had his horse stolen out of the barn. No matter whether a good horse or poor, here is something that law is bound to take notice of - that is to say, law is bound to open its ears and hearken to all that may be said on the subject. The fact that the horse is stolen is indisuptable, because the owner avers it. So far so good. Here is a foundation for a case, and nothing is lacking but the superstructure. For the rearing of that, the grave inquiry arises who stole the beast? The owner has not the slightest doubt in his mind that Ned Hubbard is the thief, and against Ned Hubbard he wants a warrant. 'What, Mr. Johnson, is the basis of your belief in Ned Hubbard's culpability?' 'Why, it is just like him'. 'Anythig more?' 'Yes; he was seen 'round my barn'. 'Has he since departed the vicinage, or does he continue at his usual place of abode?' 'Oh! he's 'round the same as ever, and that's just like him too. He's throwing dust, but he dusted off with the horse all the same'. 'Do you trace him to any act of taking or having the animal in his possession?' 'Well, no; as to that I can't say I do; but just put a warrant on him, and he'll show the white feather fast enough. I know him'. 'But no warrant should issue against a fellow citizen unless for probable cause as shown by evidence more or less specific, tending to incriminate him'. 'Fellow citizen! The place for such fellow citizens as Ned Hubbard is state prison'. 'Granted if he have done aught to send him thither'. 'Well, I've told you what I know about

it'. 'True; but have you told me aught that is specific or even specious?' 'Your'e the judge I suppose'. 'Exactly'. Exit Mr. Johnson, who goes abroad to dissiminate prejudice against the court.

Logically speaking, as earlier observed, there is a natural inclination to say that, an antecedent bad character is as reasonble a ground for the presumptionof guilt as previous good character for the presumption of innocence. The soundness of such a view, however, may fairly be doubted. If we know that a man is generally respected for integrity and a blameless life, and believe that his nature and disposition are truely represented by the outward show, the natural conclusion is that it is extremely unlikely that he should be guilty of fraud, of highway robbery or murder, and unless the evidence against him be overwhelming, our mental attitude is likely to be that there is at least a reasonable doubt whether he could have committed the crime of which he is accused - in other words, the case is not conclusively made out and he ought to be acquitted. If, on the contrary, we are informed that he was a man of bad character, there is no room, as in the case just discussed, for the evidence to be corrected and a doubt raised on account of his character - and if it had any weight at all it would incline us to say that the probability of his being the culprit as raised by the evidence of facts was strengthened.

A number of arguments and issues can be raised. For example, it is arguable that the evidence of bad character ought not to go any

further, were it admitted, than to show that there was no inherent improbability in the supposition that the accused might have committed the particular crime in question. The only problem with this line of argument is that, constituted as the bulk of mankind is, not given to nice distinctions or severe logic, it would be very likely to go further, and it is therefore wisely excluded, whether strictly relevant or not. The point was deliberated upon in R V. Rowton,[1] a case with which facts we are quite familiar. In his judgement Willes, J., said: "(Character evidence) is strictly relevant to the issue; but it is not admissible upon the part of the prosecution because (as my brother Martin says) if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to this issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety nine". Martin, B.: "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged".

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1) (1865) Leigh & C. 520, 540

Some people see the issue in a wider perspective and address their reason for the rule as such, with a concern for the morality of any rule to the contrary. Verplanck observed in People V. White[1]: "The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, professions, manners, upon the minds of honest and well-intentiond jurors". The last bit of this statement is however, open to question.

In Darling V. Westmoreland,[2] Doe, J , succinctly observed that: "(There is) an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged.... That such evidence is relevant, the law acknowledges by receiving, in criminal cases and in some civil cases, evidence of a defendant's good character in his favour, and allowing such evidence to be rebutted; and by receiving evidence of the character of witnesses and of other persons. The exclusion of such

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1) (1840) 24 Wend. 574
2) (1872) 52 N.H. 401, 406

evidence is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation".

On the whole, may I remark that even if this part of the law of evidence were regarded as an anomaly, it is not the only anomaly one can point to in the criminal law of evidence. It is undoubtedly true as aptly pointed out in some of the dicta above, and from the general history of rules of criminal evidence, that many of the rules of evidence, have their origin in the Draconian severity of criminal law, especially in the 18th and part of the 19th century. This resulted in the consequent unwillingness of judges as well as juries to convict, where for a trifling offence the only sentence provided was that of death, all felonies being so punishable. This does not however, mean that there is onlyone sole rationale for the rule that prohibits evidence of bad character in the first instance by the prosecution. For instance, it is true that such evidence when led generally, would only injure the accused by creating a prejudice against him; for, a man's guilt is to be established by proof of the facts and not by proof of his character.[1] It is equally true that when character is not in issue, to admit evidence of bad character is to cause surprise and create bias, quite often against the accused. Having made the point that a number of reasons may have motivated the

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1) R V. Turburfield, 10 Cox, 1; See also Amrita V. R., 42 C. 958 p. 1021.

rule, it is indeed my belief that the main reason for the rule is more as a result of policy and humanity rather than any scientific considerations as to the strict relevancy of the evidence in question.[1] Just as every person is assumed to be sane, an accused is assumed and should be assumed to be of normal moral character. There is therefore no need to prove character until his character is brought into question.

(b) Character In Issue

In criminal cases, the obvious prejudice to an accused, likely to result from any exposition of his bad character has led to considerable reluctance in entertaining evidence of offences which makes a man's bad character part of the case against him. It is thus clear with regard to previous bad character, that the common law, and the legislatures in the respective countries with statutory provisions in this respect, in their anxiety that persons on trial should be treated with all possible fairness and even indulgence have as far as possible excluded evidence of bad character, apart from the special cases in which a person's bad character becomes or is a fact in issue. It is my intention to undertake the present discussion under two subheads. The first is when character becomes a matter in issue or rather is put in issue; in such a case, evidence of bad character becomes admissible, the second is when character is itself in issue; likewise in such a case evidence of bad character is admissbile, but there is certainly a marked distinction between the two. In the former, usually, it occurs when the accused either by himself or

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1) See Per Cockburn, L.C.J. and Willes, J., in Reg V. Rowton (1865) 10 Cox C.C. 25; 34 L.J.M.C. 57.

through witnesses adduces evidence of his good character. As I shall reveal in a moment, this had generated quite some debate in the past, but the position of the law is quite settled today. On the other hand, the latter occurs in a limited number of cases. Such occasions in criminal cases are almost always because some aspect of character is an essential element of the offence (hence, in issue in the cases) and so may be proved by evidence like any other fact in issue. It appears that the distinction I am driving at is appreciated in the countries where this rule of evidence is contained in a statute. I hope that this point is put beyond argument by section 68 (2) (a) and (b) of the Nigeria Evidence Act[1] which states: "(2) The Fact that an accused person is of bad character is relevant - (a) when the bad character of the accused person is a fact in issue; (b) when the accused person has given evidence of his good character". In India, section 54 of the Indian Evidence Act[2] provides as follows: "In criminal proceedings the fact that the accused person has a bad character is irrelevant UNLESS evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1 - This section does not apply to cases in which the bad character of any person is itself a fact in issue".

I suppose the statutes have made clear the need to sub divide the discussion at this junction; but before that there is one important addition to be made as section 68 (4) of the Nigeria Evidence Act shows. It states that "Whenever evidence of bad character is

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1) Cap. 62, Laws of The Federation of Nigeria.
2) This section was substituted for the original section 6 of The Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891)

relevant evidence of a previous conviction is also relevant". Explanation 2 to section 54 of the Indian Evidence Act similarly provides that "A previous conviction is relevant as evidence of bad character"; both explicitly saying the same thing. Now, going back to the discussion, I will like to follow the sequence adopted under section 54 of India Evidence Act, in the present discussion, purely for convenience, and that means I shall start by considering the situations when the accused bad character can be given in evidence as a result of his having given evidence of his own good character.

As we know, the Indian Evidence Act came into operation in 1872, while the Nigeria Evidence Act came into operation in 1945, and it is clear that they both derive from the common law rules, both countries being members of the common wealth, with common historical background. There is no doubt in my mind, that what the above sections embody is the common law rule as stated in R V. Rowton,[1] a case which predates both Acts; the case decided inter alia that evidence of bad character cannot in the first instance be given for the prosecution against the prisoner, but after a defendant has attempted to show his good character in his own evidence, prosecution may in rebuttal offer evidence of his bad character. It is interesting to note that the court in this case was not unanimous on that point. This dissension is significant as it contains some strong and germane criticisms worthy of consideration. Ironically, one can say that it was this case that gave the rule prominence and a lasting seal of authority. I intend to quote extensively from the case of R V. Rowton,[2] being

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1) (1865) 34 L.J.M.C. 57
2) (1865) Leigh & C. 520

the main authority on the issue, where all the arguments for and against were well put forward. I suppose there is no need to go into the facts again as we are quite familiar with it by now and I will like to commence with the dissension from no less a person than Martin B.[1] He observed as follows: "...a practice has sprung up that witnesses are admitted to be called when a man is charged with an offence of any kind to give evidence as to his good character with respect to that species of crime charged against him, and the liklihood of his committing this crime. It seems to me that this is an anomaly. I gather from the books that it was permitted in favorem vitae, not as bearing upon the issue, but as a matter which was permitted by the benignity of the law to be given in evidence, and that occurred as long as two hundred years ago. In no one single instance during the whole of that period has evidence of general bad character been given. No case can be cited of any trial that has ever taken place on which such evidence was admitted. It is quite true that in several text books it is stated that such evidence is admissible, and the authors of those text books are persons whose expression of opinion is worthy of the highest possible consideration. Not one of them has cited an instance in which the thing has been done. I am not at all unconscious of the strength of the observations made by the Lord Chief Justice. It is a common practice that when the counsel for the prisoner intimates an opinion about hearing witnesses to character, the counsel for the prosecution say

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1) (1865) 10 Cox C.C. Pp. 35 - 37

'Be careful what you are doing, for you may injure your client's cause'". Making a somewhat cryptic admission, he continued; "On the other hand no doubt if this evidence in reply is admissible, there would be a stronger reason for it". To which he added with alacrity: "But what I rely on is that no single instance has been adduced.... in which evidence of this sort has been admitted, and therefore the doubt at present on my mind leads me to the conclusion that the better way of treating the matter is, not as though evidence to good character is an anomaly, but proceeding on a course of precedents, that it will be better to leave it as it stands. I own I do not know that much evil will arise from it, for probably not withstanding this judgement the criminal trials will go on pretty much in the way that they have hitherto done, but such is the extreme mischief of given evidence of bad character, given with a speech by the counsel for the defendant that he would be entitled to give, and then a general reply by the counsel for the prosecution upon the matter, that I can see cases in which far too much weight would be placed on such evidence of general bad character, and on which convictions might be obtained when convictions ought not to be got. If it rested with me I should take time for further consideration; but when I find that my learned brothers are of the opinion that the evidence is admissible, I can say nothing but that I concur with them, although I am disposed to act on what has been so far as I know the universal practice and the precedents for the last two hundred years. I do not myself believe that the course of the administration of the criminal law would be

altered by it. The matter may be carried to a greater extent. Suppose a man tried for a robbery in the street, and evidence given as to his good character, and a policeman is called to say that he had known him for years as a common thief in the street, and that he has been apprehended a dozen times, that he apprehended him himself, and that would appear from the decision of the magistrates - the man being tried for the offence with which he is charged, he is in reality tried on the evidence of generally being a thief. It would be better to confine the real offence to that which is established by the evidence applicable to it, leaving the evidence of character to make what weight it may with the jury without allowing any reply. I acquiesce in the opinion of the majority of my learned brethen, and of course will act upon their view in any court in which I may be called upon to act". Whatever Martin, B., may say in the last sentence, we are put in no doubt about his position. As I said earlier, he has some pertinent points with which to buttress his argument, but for now I will not comment, perhaps it will be better to consider the views expressed by the other judges in their judgements first, especially as they seem to answer most of the issues and questions raised in his judgement. Then we can see how much the answers put forward by the other judges have managed to detract from the strength of Martin B's argument. However, it is worth mentioning that in actual fact, Martin. B., had expresssed a similar though not as detailed view as above in the earlier case of Reg V. Burt.[1] In that

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1) (1851) 5 Cox. C.C. 284

case, the accused, Burt, was indicted with other persons for stealing from a dwelling house with a count charging as a reciever. The prisoner, called a witness who gave evidence of his general good character. The prosecution, then proposed to give evidence of the prisoner's general bad character but Martin B., cut in saying: "I think you cannot do that". He was referred by the prosecution to Russel on Crimes[1] where it said, "the prosecutor cannot enter into the defendant's character unless the defendant enable him to do so by calling witnesses in support of it; and even then the prosecutor cannot examine to particular facts, the general character of the defendant not being in issue, but coming in collaterally;" referring in a note to Buller's Nisi Prius,[2] citing Martyn V. Hind.[3] However, Martin, B., retorted that "the authority cited from Russel is very old. Independently of other objections, the course would be very inconvenient in practice....". On the following day, Martin, B.,[4] said: "With reference to the case of Burt, in which a question was yesterday raised, of whether or not after a witness had given evidence of the prisoner's good character, it was open to the counsel for the prosecution to give evidence of the prisoners general bad character, I have consulted my brother Erle, and he agrees with me in thinking such evidence inadmissible. He says he has never known such a course pursued, and thinks it ought not to be allowed".

One interesting fact that emerges from Reg V. Burt[5] is that while Martin, B., maintains his view in R V. Rowton,[6] as we have already seen, Erle C.J., appears to have made a volte-face by the time of

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1) Russel On Crimes by Greaves, p. 786
2) at p. 296
3) Cowper's Rep. p. 437
4) (1851) 5 Cox C.C. at p. 285
5) (1851) 5 cox C.C. 284
6) (1865) 10 Cox C.C. 25

Rowton's case. (I assume it was the same Erle C.J., in Rowton's case, that Martin, B., asked for his opinion in Burt's case.) Erle C.J., [1] without making any allusion to Reg V. Burt, (not totally surprising as Martin, B., did not either in his judgement) observed as follows: "I concur with the Lord Chief Justice in many parts of the judgement that he has just delivered. The admissibility of character for the prisoner stands on peculiar grounds, and the question of the admissibility of witnesses to say that that character is undeserved is now brought for the first time for adjudication before the court. I take the progress of our law to be according to the great interests of society, and so the law is adapted with respect to the admissibility of evidence, and it ought to be regulated by attending carefully to the interest of truth. If a prisoner having a bad character proposes to adduce witnesses to mislead the court by saying that he has a good character, contrary to the interest of truth, then the falsehood should be removed, and I quite agree with the Lord Chief Justice that the evidence in reply in this case was admissible, and that the first question ought to be answered accordingly". Before going on to the judgement given by Cockburn, Lord Chief Justice, I would like to observe that the above statement from Erle, C.J.'s judgement does not strike me at all as that of somebody who might have held a contrary view before, infact he satisfactorily marshalled his points and I find his argument quite convincing.

After alluding to the questions before the court, Cockburn, C.J., [2]

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1) Ibid at p. 32
2) Ibid at p. 28

continued: ".....the first, whether when evidence in favour of the character of the prisoner has been given on his behalf, evidence of bad character can be adduced upon the part of the prosecution to rebut the evidence so given. I am clearly of the opinion that such evidence may properly be received. It is true, that probably in the experience of all of us no occasion has presented itself when such evidence has been given on the part of the prosecution. That may be easily explained by the circumstance that it seldom happens that evidence is called to the character of a prisoner, when those who represented the prisoner are aware that the character will be liable to be rebutted. Notice is often given from a sense or spirit of fairness by the prosecuting counsel, that if any attempt is made to set up the character of the prisoner against the facts adduced on the part of the prosecution, that will be met either by a rigourous cross-examination or rebutting evidence; but it seems to me when we come to consider whether such evidence is admissible, speaking logically and reasonably, it is impossible to come to any other than one conclusion. It has been put, that evidence in favour of the character of a person on his trial raises a collateral issue. I can hardly think that it is a collateral issue in the proper sense of the term; it becomes one of the pivots on which the jury are to found their verdict and take into consideration with the evidence; and if the prisoner thinks proper to raise that issue as one of the elements for the consideration of the jury, nothing can be more unfair or unjust, and fatal to the proper administration of justice, than that the

evidence should go to the jury altogether one-sided in its nature, and that the prisoner should have on the consideration of his guilt or innocence, the advantage of an assumed unblemished character, when in point of fact, if his true character was known, it would be found to be just the reverse; and therefore that is a ground and reasonable ground for not excluding it". It is significant to mention that all the other judges including Martin, B., submitted a concurrence, and I do too. Finally, to the judgement given by Willes J.,[1] which I must say I find somehow intrueguing in the sense that while on the one hand he confessed his support for the decision given by Martin, B., on the other hand for some unknown reason, he chose to follow the contrary viewpoint. He said, "With respect to the first question whether evidence was admissible on the part of the prosecution to answer evidence of character given by the prisoner, I own that I should be glad if the court could have come to the conclusion that such evidence should be rejected, and that for the reasons stated by my brother Martin;" The statement so far puts us in no doubt about his (Willes, J.,) own personal view. However he went on and said, "but I am clearly of opinion that the court could not come to that conclusion, because looking to the statements in the books of practice, and especially those in the works of Roscoe, Phillips and Starkie, I think it is clear that such evidence must have been given for a series of years, and the practice must have been settled as stated. The learned writers have stated the fact, and they could not

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1) (1865) 10 Cox C.C. at p.37

have derived their information from reported cases, because no such cases have been referred to, notwithstanding the industry of counsel. They must have spoken from practice, and what they had observed. My reason, therefore, for believing that this evidence is admissible is founded altogether upon the fact that such has, I believe, in former times been the practice, to a sufficient extent to settle the law; and the fact that we find no case reported in which such evidence was given does not operate upon my mind, because the trials at which such a question could have arisen are not reported. There were not Nisi Prius reports until at a comparatively recent period. I must agree therefore, that the evidence was admissible. I have stated I should have been glad if I could hold that it was not, because I cannot help thinking that such a course is exceedingly unusual, and is one for which no precedent can be produced, and of which there is no information at the bar or upon the bench, and whatever may be the law upon the subject, it has been found inconvenient that that course should be resorted to, and it has become in modern times obsolete. However, as our law is not subject to a negative prescription, I must hold, as it appears to be settled that such evidence could be given when a person claims it for the interests of the cause he represents, that the judge is bound to receive it". There is a noticeable vacillation in Willes C.J.'s judgement and it is a significant sympton of indecision, which way to go, but I'm in no doubt that his sympathy lies with Martin, B., as he seems to emphasise over and over that he will settle for the opposing viewpoint just on the ground that the learned

writers he cited had so pronounced. I must say that I find such a position uninspiring, he should have clearly pitched his tent one way or the other. Save for Erle, C.J.'s judgement, all the other judges appear to have repeated over and over the inavailability of any precedents on this point, and I think that is fallacious. To start with, the case of Reg V. Burt, [1] considered the question, the decision may have been though unacceptable to the court in Rowton's case. In R V. Burt, outside the citing of the learned writers, the case of Martyn V. Hind[2] was cited to support the fact that the prosecution could adduce evidence of bad character if the defence gives evidence of good character. Furthermore, the cases of R V. Harrison,[3] and R V. Hampden[4] show that since the last decade of the 17th century, the common law rule has been that the prosecution can tender evidence of bad character. These cases were apparently not brought to the attention of the judges, and since a good part of Martin, B's argument rested on the ground that there were no decisions to back up the writers, it appears his position must be tenuous if not totally groundless. I would think that the reason the text books did not contain the cases is because they were written very long ago, and were not revised with time as we have today. However, it must be said that Martin, B., made some significant points like the mischief of giving evidence of bad character; this fact cannot be denied as evidenced in my earlier discussion, but in those cases, what has been anticipated was evidence of bad character given in first instance,

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1) (1851) 5 cox C.C. 284
2) Cowper's Rep. p. 437
3) (1692) St. Tr. 833, 864
4) (1684) 9 St. Tr. 1053, 1103

and not in reply to evidence of good character. In that sense, I find myself agreeing with the view of Erle C.J.[1] when he said, "If a prisoner having a bad character proposes to adduce witnesses to mislead the court by saying that he has a good character, contrary to the interest of truth, then the falsehood should be removed.....". This is well in line with the view expressed by Cockburn, C.J.,[2] when he said: ".... if the prisoner thinks proper to raise that issue (good character) as one of the elements for the consideration of the jury, nothing can be more unfair or unjust, and fatal to the proper administration of justice, than that the evidence should go to the jury altogether one sided in its nature, and that the prisoner should have, on the consideration of his guilt or innocence, the advantage of an assumed unblemished character, when in point of fact, if his true character was known, it would be found to be just the reverse;" and I totally agree with the viewpoint. Clearly, the two main grounds on which Martin, B.'s argument was based has given way, so the argument cannot stand, just as Willes, J.'s[3] sympathy can now be seen as freakish. In the United States, the propriety of such evidence has been uniformly conceded as the case of United States V. Holmes[4] reveals. Clifford, J., in his judgement in the case said: "Such evidence (referring to bad character) is never admitted until the accused .... has laid the foundation for its introduction by offering evidence to show that he is of good character, and then the counterproof is properly admitted as rebutting testimony". In Lord Mansfield's[5] phrase, the defendant, by going into his own character

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1) (1865) 10 Cox c.C. at p. 32
2) (1865) 10 Cox C.C. at p. 28; see also Alderson, B., and Campbell C.J. in R V. Shrimpton (1851) 2 Den. Cr. C. 322;
3) (1865) 10 Cox C.C. at p. 37
4) (1858) 1 Cliff. 111, 115 Fed. Cas. 382
5) 2 Atk. 339

gives "a challenge to the prosecutor".

Problems however arise as to the application of the rule in some cases, for instance when one has to distinguish between evidence of bad character and moral character and demeanours. Such a situation arose in Attorney General V. Cornelius O'leary and Hannah O'leary.[1] In this case, two prisoners, brother and sister, charged jointly with the murder of another brother, were convicted and sentenced to death. During the course of the trial, the following questions were put by the judge to one of the witnesses:- The Judge: "What kind of a woman was Hannah (the female prisoner) in disposition - was she cross?" Witness: "She was not cross to us". The Judge: "Had you any opportunity of observing her demeanour about her own place? Was she cross or good tempered?" Witness: "When she would meet us she would not want to talk. That is how she would treat us". The Judge: "Was she different from Mary Anne (another sister)?" Witness: "Yes, she was". The Judge: "Mary Anne was a good tempered, pleasant woman?" Witness: "Yes, my Lord". On appeal to the court of criminal appeal, objection was taken, on behalf of the prisoners to the admissibility of this as evidence; it was submitted that it was evidence of the bad character or disposition of the female prisoner, which could only be admitted if evidence had first been offered by her as to her own good character; and could only be proved by evidence of general reputation and not by the experience of the particular witness. The court held that the evidence and the answers of the witness did not refer to moral

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1) (1926) Ir. Rep. 445

character, nor to general reputation, nor to a moral disposition or tendency to commit the crime of murder; and that the witness stated nothing but the demeanour and manners of the prisoner and of her sister as manifested to the witness, and accordingly, as the evidence was, in the circumstances, relevant, the objection to its admissibility was unsustainable. In his speech to the court, Kennedy, C.J.,[1] distinguished O'leary's case from Rowton's case. He said: "... objection has been most pressed with reference to four questions put by the judge to Ellen O'Regan, a neighbour of the O'leary's. .... It is contended that this was not evidence, and was illegally admitted. It is urged that it comes within the rule stated in The Queen V. Rowton.[2] It is said that this was evidence of the bad character or disposition of Hannah, which (a) could only be admitted if evidence had first been offered by her as to her own good character; and (b) could only be proved by evidence of general reputation, and not by the experience of the particular witnesses. Apart from the question whether Rowton's case is an accepted authority regulating the mode of proving bad character, the court is of opinion that it does not refer to the type of evidence under consideration here. This evidence and especially the answers of the witness, does not refer to moral character, not to a reputation, nor to a moral disposition or tendency to commit the crime of murder. The witness does not state her opinion of the accused. She states nothing but the demeanour and manners of the prisoner and of her sister as manifested to her, the witness". Kennedy, C.J., continued by asking the question, "Was it relevant?"

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1) (1926) Ir. Rep. 445 at 453
2) (1865) 10 Cox C.C. 25

To which he answered: "One of the matters telling in favour of the prosecution was the sullen reticence of the accused, Hannah. It seems to the court to have been relevant, and in the prisoner's favour to show that reticence and sullenness were her normal manner, and not merely the outside signs of her now guilty conscience. Again, for the defence, a picture of Mary Anne as an unpleasant looking and powerful woman likely to do murder had been drawn. The court does not think it irrelevant to state that, on the contrary, her demenaour and manner were good tempered and pleasant".

Although it has been stated that an attack by the crown on the accused's character is generally inadmissible, evidence otherwise relevant which indicates that the accused is of bad character, will not on that amount be excluded. For example, if a man is charged with the murder of his mistress, the immoral relationship between them must necessarily be disclosed.[1]

The second part of our present discussion, that is, when character is itself in issue, is in respect of some special statutes[2] which by their provisions bring character into issue. As these important statutes have already been discussed under similar fact evidence it will be unnecessary repeating the discussion. It is important to note that sections 54 of the Indian Evidence Act and section 68 of the Nigeria Evidence Act have no application when the bad character of any person is itself in issue.

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1) Walker and Walker - Law of Evidence in Scotland at Para. 21;
2) See s. 27 (3) Theft Act 1968; s. 15 of The Prevention Of Crimes Act, 1871; S1 (2) of The Official Secrets Act, 1911 etc.

(iii) CROSS EXAMINATION OF WITNESSES AS TO ACCUSED'S CHARACTER

Where the accused brings a character witness to testify on his behalf, the restrictions on the adduction of evidence of bad character of the accused are, surprisingly, relaxed when that witness is cross-examined for the purpose of attacking the credibility of his character evidence; thus he may be cross-examined not only as to his own but also the accused's previous conviction. Using exactly the same words, sections 140, and 193 of the Indian and Nigeria Evidence Acts[1] respectively, provides that: "Witnesses to character may be cross-examined and re-examined". It is significant to note the observation made by Taylor,[2] to the effect that according to English practice it is not usual, except under special circumstances, to cross-examine witnesses simply called to speak to the character of the prisoner; but no rule of law forbids this course. The rule embodied in the sections above, is not a deviation from the English rule, as theword used is "may". The right has been given and when an accused calls witnesses to prove his previous good character they should, in proper cases be cross-examined, and the answers given by witnesses in cross-examination on the subject of the accused's character may be contradicted by other evidence. However, though it is clear that the character witness is cross-examinable about his own credibility, the accused reputation and his knowledge of it, difficulties have arisen with regard to some issues, like, rumours concerning the accused's conduct; the divisibility of the accused's character and his previous convictions; and it is with each of these that

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1) Indian Evidence Act 1872; Nigeria Evidence Act, 1945
2) Taylor On Evidence, sec. 1429; Best on Evidence sec. 262

the present discussion will be concerned.

As pointed out in earlier discussions, under the common law, neither the defence nor the prosecution in rebuttal is permitted to give evidence of particular instances to prove the good or bad character of the prisoner. Particular good acts have been rejected in a number of known cases;[1] in R V. Davison,[2] Lord Ellenborough, C.J., kept interrupting the defence witnesses to character to remind them that what was admissible was evidence of general character, and not of particular instances. This rule of exclusion is also supported by R V. Rowton,[3] where both counsel agree upon it; but there is at common law an exception that is of importance, and the exception arises where the prisoner produces a defence witness to character. In R V. Hodgkiss,[4] Alderson, B., said: "It is not usual to cross-examine witnesses to character, except you have some definite charge to which to examine them".

However, considering the later case of R V. Wood and Parker,[5] one may be tempted to take the view that such cross-examination must be confined to rumours. It has been held in R V. Wood and Parker that a character witness may be cross-examined as to his knowledge of mere rumours concerning the accused's involvement in criminal activities for the purpose of showing that his evidence of the accused's character is unreliable. In that case, robbery was the crime charged, and the accused having called a witness to character, the question arose whether this witness might be cross-examined with regard to a rumour

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1) R V. Horne Tooke (1794) 25 St. Tr. 1, 359; R V. O'Connor (1798) 27 St Tr. 1, 31
2) (1808) 31 St. Tr 99, 187 - 193
3) 11 L.T. 745, 746
4) (1836) 7 C. & P. 298
5) (1841) 5 Jur. 225

that the accused had committed another robbery. Questions on the subject were allowed because "character is made up of a number of small circumstances of which his being suspected is one". Though not explicitly stated it appears from this decision that a witness as to the accused's character may be cross-examined regarding a rumour about the accused.

In Scott V. Sampson,[1] however, Cave, J., observed as follows: "As to the ..... evidence of rumours and suspicions to the same effect as the defamatory matter complained of, it would seem that on principle such evidence is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have in fact, affected the plaintiff's reputation, thay may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumours and suspicions is to give anyone who knows nothing whatever of the plaintiff, or who may even have grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked from the most disreputable sources, and what no man of sense, who knows the plaintiff's character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who has started them". Cave, J., went on to cite a case decided on a contrary viewpoint; he said: "In

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1) (1882) L.R. 8 Q.B.D. 491 at 503 - 4

Leicester V. Walter,[1] evidence of rumours and suspicions was admitted by Sir James Mansfield against his own judgement; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumours and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation". He (Cave. J.,) then concluded by saying that, "upon the whole, both the weight of authority and principle seem against the admission of such evidence". Regardless of the above sentiment expressed by Cave, J., with regard to where the weight of authority lies, it is the general view[2] that today there is no clear English authority on the subject. In view of this, it is unfortunate that this dire position of the law was ignored by the court of criminal appeal though applicable in R V. Savory.[3] In this case the appellant was charged with indecent assualt on two young girls. The two girls, who were aged respectively nine and ten, stated that they had been indecently assaulted at Cromer Railway Station by a man whom they said was the appellant, who was an employee at that station. There was no corroboration of thei r evidence. The appellant gave evidence and put his character in issue, calling as a witness the station master, under whose immediate supervision he worked. That witness was cross-examined on a complaint alleging that the appellant had some time previously indecently exposed himself. No proceedings were taken in respect of that complaint. It remains, therefore, not a case in which the appellant had been tried and

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1) 2 Camp. 251
2) Cross On Evidence, 5th ed. at p. 407
3) (1942) 29 Cr. App. R.1

acquitted, but in which nobody has ever put him on trial or given him an opportunity of answering such a charge as was made against him. The court in giving its decision held that the conviction must be quashed on the grounds that, first, there was no corroboration of the girls' evidence and no reference had been made in the summing-up to the desirability of corroboration; and second, that the cross-examination of the appellant offended against the rule laid down by the House of Lords in Maxwell V. Director of Public Prosecution.[1] The court in its judgement, clearly failed to express any opinion with regard to the cross-examination of the character witness, as to the unprosecuted complaint. If a view was given on that, it would have gone a long way in helping to resolve the uncertain state of the law today. A similar opportunity also arose in the earlier case of R V. Waldman,[2] but the court failed to comment here too. The appellant

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was convicted, on a charge of receiving good knowing them to have been stolen. In his evidence at the trial, the appellant stated that he had bought the goods, which included articles of jewellery, on sale or return from a person whom he believed to be an honest business man, though he had since discovered that the person was a receiver of stolen property. A witness called for the defence said that he had known the appellant for twelve years and that the appellant bore a good reputation for honesty. Thereupon counsel for the prosecution put the following question to the witness in cross-examination: "Would you be surprised to hear that (the appellant) has actually been convicted of receiving and charged afterwards with recei-

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1) (1935) A.C. 309; (1934) All E. Rep. 168; 103 L.J.K.B. 501
2) (1934) 24 Cr. App. R. 204;

ving, but acquitted?" Later at the request of the prosecution the appellant was recalled, and admitted that he had been convicted of receiving stolen goods in 1920 and bound over, and that two years later, he had again been charged with receiving stolen property, but had been acquitted. In upholding the conviction, the court merely distinguished the case from that of Maxwell V. Director of Public Prosecution. Though the decision is perfectly correct, I would have thought that the court would at least comment on the cross-examination of the defence witnes to character but instead Avory, J., said that: "It is not necessary either to consider or to express an opinion on the point". I will like to mention that in the United States, most jurisdictions admit the cross-examination to rumours.[1]

Now with regard to the problem of the issue of divisibility, we should remind ourselves again, that though a prisoner is generally allowed to prove his good character, where he sets this up, evidence of his bad character may be tendered. The question then is, what limitations on the uses of the accused's character are imposed by the principle of relevancy; to which one would be tempted to answer that, the rule that evidence of bad character may be given when evidence of good character has been tendered is subject to the consideration that the evidence sought to be given must be one which is relevant and admissible. In other words, the evidence of character or disposition offered, whether for or against the accused, must involve the specific trait related to in the act charged. However, as we shall soon

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1) Comm V. Becker 191 Atl. 351, 356, Supreme Court of Pennysylvania.

find out, this issue has generated a lot of controversy, dating back into history, and even today one cannot say for sure that the issue has been conclusively resolved. One thing is however clear and that is that where evidence of character is offered it must be confined to general character; evidence of particular acts e.g., of honesty or benevolence or the like, cannot be received.[1]

As I pointed out above, the issue has a long history behind it. for instance both R V. Faulconer,[2] and R V. Hawkins,[3] are decided on the ground that the prosecution could attack the prisoner's character without reserve or limit. On the other hand however, in R V. Dover,[4] a case of seditious publication; a witness testified that the defendant was a faithful member of the train-band. To which L.C.J. Hyde interjected: "Do not mistake yourself. The testimony of your civil behaviour, going to church, appearing in the train-bands, going to Paul's, being there at common service, - this is well. But you are not charged for this. A man may do all this, and yet be a naughty man in printing abusive books, to the misleading of the king's subjects". This is not, however, a strong authority, as his Lordship and Keeling, J., interrupted the character witness suggesting that D. should be cashiered the band, an indication that their minds were already made up on on the issue before the jury. The decision in this case has been described as a very strict application of the rule, if rule there can be said to be at that stage, for good service in the train-bands is thought to be evidence of loyalty, and loyalty is certainly a trait relevant to a charge of sedition. But while

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1) J'Ansen V. Stuart 1 TR 754; See also Norton, Evidence at p. 234.
2) (1653) 5 St. Tr. 323, 354-6
3) (1669) 6 St. Tr. 921, 935, 949
4) (1663) 6 How. St. Tr. 539, 552

there was yet no hard and fast rule, common sense would dictate that character evidence should bear some analogy to the issue, and this is the type of evidence usually offered. For example, in R V. Turner,[1] on a charge of burglary, the defence seem to have produced evidence of honesty; and in R V. Lowick,[2] on a charge of plotting to assasinate the king, the defence evidence was that L. was not "cruel or bloody-minded", and other examples of this line of reasoning abound. For instance in the first trial of Captain Kidd[3] in 1701, for murder, he sought to lead evidence of his loyal service to the crown, but Ward, L.C.B., had already summed up to the jury, and rejected the evidence as offered too late, and also as of no avail on a murder charge. Captain Kidd pleaded: "My Lord, I have witness to produce my reputation; ..... I can prove what service I have done for the king (as king's officer before I turned pirate)" to which L.C.B Ward replied: "What would that help you in the case of murder".

It has been suggested that it was not until the two great treason trials of 1794, in which Thomas Erskine, later Lord Chancellor, figured so prominently as defence counsel, that a clear rule became discernible. In R V. Hardy,[4] he argued that the character proved must always be analogous to the nature of the charge, and the then solicitor general, Sir John Mitford, later Lord Redesdale, Lord Chancellor of Ireland, did not attack this principle, but merely objected to evidence of particular facts. Again in R V. Horne Tooke,[5] Erskine advanced a similar plea, he argued: "The meaning of

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1) (1664) 6 St. Tr. 565, 613
2) (1696) 13 St. Tr. 267, 299
3) (1701) 14 St. Tr. 123, 146
4) 24 St. Tr. 199, 1076
5) 25 St. Tr. 1, 384

witnesses to character is this, for instance, put the case of a man who is charged with a crime of a particular description - suppose a man charged with an unnatural crime; would it be any evidence at all to that man's character that he paid his bills regularly, and that he was not a dishonest man, or anything of that sort? No, your examination to character must always be analogous to the nature of the charge; and you would there inquire whether he was a man of chastity; you would inquire into his regard for women, into his morals, and into his conversation, so as it might rebuff any such horrible and detestable idea of having passed in his mind, that he was a man capable in the ordinary course of his life of entertaining such opinions and making use of such expressions .....". Sir John Scott, later Lord Eldon L.C. in reply, apparently agreed with this part of Erskine's argument. However, in neither case was the question expressly declared, but Erskine's argument on the point went uncontroverted; but in R V. Turner,[1] came a clear decision. In the case T. was indicted for treason, and his counsel cross-examined a prosecution witness as to T.'s general character. Abbot J., as Lord Tenterden C.J., then was, upheld the prosecution objection that the proper question was as to loyalty, as in rape it was to chastity,[2] and when the defence counsel was examining his own witnesses to character he took the hint and asked them as to T.'s character for loyalty.[3] He also asked permission to examine them as to T.'s reputation for humanity as this was not inapplicable to the charge. This was rightly allowed, as the alleged treason related to an armed attack plan-

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1) (1817) 32 St. Tr. 957
2) Ibid at 1007
3) Ibid at 1058

ned upon Nottingham. This appears to be the last direct decision restricting the defence evidence of character to traits relevant to the charge, but the textbooks adopt this rule from Phillips[1] onwards, and there are supporting dicta in some very familiar later cases. For example, in R V. Shrimpton,[2] where S. was indicted for larceny in 1851, and the indictment referred to a previous conviction for larceny in 1838. This case was ostensibly decided upon The Previous Convictions Act 1836. The pertinent aspect of the case for the present purpose is the question posed by the defence counsel, to the effect that, suppose the evidence was that the accused had been convicted of rape? (This being a case of larceny). Alderson B.,[3] gave the answer: "It is not every sort of evidence as to character which would be relevant. It would be no answer to a good character for honesty, to show that he was an immoral man, that he had been convicted of rape or violent assault". R V. Rowton,[4] seems to have confirmed the view expressed by Alderson B., by indicating that rebuttals should be confined to character evidence of the same kind. Martin B.,[5] said it must be "good character with respect to the species of crime charged against him". Even though these two cases above cannot be said to have involved exactly the same issue as the earlier cited cases,[6] because while these two recent causes involved the questioning of the prosecution witnesses, the older cases actually involved the precise issue of cross-examination of the character witnesses for the defence, it is essential to note that

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1) 4th ed. (1820) Vol. 1, 191
2) 2 Den. C.C. 319, 322; 169 E.R. 521, 522
3) 2 Den. C.C. 322 at p. 388
4) (1865) Leigh & C. 520
5) Ibid at 537
6) e.g R V. Hardy 24 St. Tr. 1076; R V. Horne Tooke, 25 St. Tr. 1, 384

their dicta are of importance with regard to the matter. So, it does appear that for quite sometime since R V. Turner,[1] the court did not have to decide on this issue until it arose in the case of R V. Winfield.[2] In this case, the question arose whether the witness can be asked about any former conviction, or whether it must be relevant to the character trait under consideration. The facts were as follows:- The appellant who was charged with indecent assault on a woman, called a witness and asked her questions to establish his good character with regards to sexual morality. The witness was then cross-examined by the prosecution on the appellant's previous convictions of offences involving dishonesty. The court held that the cross-examination was proper, as the appellant had by his questions put his general character in issue, and that he could not claim to be protected as having put in issue a part of his character only, or as Humphreys J., would rather put it: "There is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half". If I may just add, it appears that there are inaccuracies in the reporting of the case which may be due to the fact that the appellant was not represented at the trial, and the counsel who later took up the case at the appeal got mixed up with the facts. I have been able to figure that out from a statement by the counsel[3] in which he said that: "In the circumstances the appellant should not have been cross-examined with regard to his general character. He was unrepresented at the trial, and though admittedly the Deputy Chairman did give him some warning of the

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1) (1817) 32 St. Tr. 957
2) 27 Cr. App. R. 139
3) 27 Cr. App. R. at p. 140

danger of calling the witness, he did not represent to him that by so doing he would put his general character in issue. The appellant was not seeking to introduce evidence of his general character, but only of his character with regard to women". Anyhow, dealing with the more germane issue, the court of criminal appeal was clearly of opinion that the conviction about which the character witness is asked need not concern the subject matter of the charge under investigation; and this principle has been criticised by Noakes,[1] because in his words: "If a man is charged with forgery, cross-examination as to his conviction for cruelty to animals can have no purpose but prejudice". This criticism with respect goes to the root of the matter, to my mind, because prejudice is the ground for exclusion, and I share the opinion expressed in the criticism. It is clearly consistent with the rationales for a number of rules of evidence with regard to character. Certainly, it is arguable that at common law this principle expressed in Humphrey J.,'s statement is not borne out by principle or by authority.[2] It is submitted that the criticisms are well founded, although Winfield's case appears to have been approved in the House of Lords in Stirland V. Director of Public Prosecutions,[3] a decision which is primarily concerned with the construction of the Criminal Evidence Act 1898, and if Winfield was asked about his previous conviction under that Act, as may have been the case, the question would have been easier to justify on principle as a matter affecting the credibility of his own previous statement

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1) Noakes, Introduction To Evidence, 4th ed. at p. 140
2) see Is The Prisoner's Character Indivisible? by R. N. Gooderson, 11 C.L.J. at p.377.
3) (1944) A.C. 315, (1944) 2 All E.R. 13

about his character. As earlier mentioned, the direct English authority on the point came to an end as early as 1817 with R V. Turner,[1] an authority that character evidence offered by the defence should be confined to the specific trait; and although R V. Winfield,[2] gave a decision on the same point, there are serious doubts and misgivings about the case as an authority, however it is significant to note that it was decided on a contrary reasoning. I think enough has been said to show that the law as to putting any kind of character evidence of the accused to a character witness is somewhat uncertain, and a clear decision after a consideration of the two opposing views would be most helpful. Obviously, in the absence of modern English authority, it is instructive in order to realise that aim, to consider the law of the United States on the subject. Starting with Wigmore,[3] he stated that the character offered must involve the specific trait related to the act charged, and as we shall soon find out there are a number of American authorities that line up behind him to confirm his view. In People V. Fair,[4] a case of murder by a mistress, the court held that the defendant's character for unchastity is not relevant to the act. It is observed that: "It is incorrect to say that the general character of the prisoner is received even in his own behalf"; it must be "general character as to the trait involved in the offence charged". In State V. Bloom,[5] where B., was indicted for larceny she was permitted at her trial to prove that her general moral character or reputation was good. The State (prosecution) appealed to the Supreme Court of Indiana, and it was

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1) (1817) 32 St. Tr. 957
2) 27 Cr. App. R. 139
3) Wigmore On Evidence, 1, 458, Sec. 59 (1940)
4) (1872) 43 Cal. 137, 147, see also Bhagwan Swarup & Ors V. S, A 1965, SC 682.
5) (1879) 68 Ind. 54, 57

held that the evidence as to character must be confined to her general reputation for honesty and integrity. It is interesting to note that Warden J., supported his view by quoting from the leading text books on evidence, not only from the American writer, Greenleaf, but also from Phillips,[1] an English writer. The learned judge gave his reasons as follows: "If a defendant, when put on trial for an alleged crime has a right to prove his good character in all respects and in all traits, without limitation to the traits supposed to render the commission of the crime improbable, and gives such evidence, it would seem to follow that the state would then have a right to attack that character in as broad a sense as that in which it was sustained by the evidence given by the defendant. The state would then have the right, in other words, to disprove the case made by the defendant as to character in all its parts. Nothing occurs to us that the defendant may prove by way of defence, which the state may not disprove. Hence, if on the trial of a woman for larceny, she legally gives evidence of her general good character, without limitation, that evidence would include good character as to chastity, veracity, etc., as well as honesty. The state, it would seem, could then attack the case made by her in all its parts, and show that her general character for chastity, veracity, etc., as well as honesty was bad. The law does not contemplate the raising of such irrelevant issues". This view was confirmed by McClellan J., in Morgan V. State,[2] he said: "The object and effect of such evidence is to disprove guilt by

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1) Apparently from the 8th ed. (1838) 490
2) (1889) 88 Ala. 224, 6 So. 761

furnishing a presumption that the defendant would not have committed the offence; and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act". This clearly means that the proffered evidence must have pertinence to the crime charged.

A case illustrating that the state (prosecution) too, is confined to character evidence relating to the relevant trait (in rebuttal) is State V. Bell,[1]. In this case, B. was indicted for offering a bribe to a public officer to procure the appointment of X. as a patrolman. Defence witnesses testified that B.,'s general reputation for honesty was good. These witnesses were cross-examined as to offences against the liquor laws committed by B. On appeal to the Supreme Court of Iowa, B.,'s conviction was reversed on the ground that the cross-examination should have been confined to what was said of B., in the community that would in any way affect the trait of character about which testimony was being given.

Doubtless, in practice some courts often are liberal in permitting the defendant to offer his general character. But the prosecution's rebutting repute may be of the specific repute, even though the defendant has been allowed a wider scope to offer his general character; we can briefly look at some of the cases that have allowed or rejected more liberty to the defence. For example, in State V. Lee,[2] L., was indicted for rape, and it was held that the defence could prove L.'s character for peace and quiet. But while the court has allowed it in this case, some others may reject it, and I think

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1) (1928) 221 N.W. 521, 523
2) (1878) 22 Minn. 407

it is because it is not that easy sometimes to tell whether or not a trait relates to the crime charged. For example, in Linececum V. State,[1] L. was indicted for rape, and offered a witness as to his general reputation as a peaceable and law-abiding man. The trial court excluded this evidence, holding that it must be confined to his general character for chastity and morality, but the court of Appeals of Texas reversed the conviction, holding that in all cases where the accused is charged with personal violence upon another, he should be permitted to prove his general character for peace and quiet. However, one could say that these two cases are not really instances of the rule being relaxed in favour of the defence, though the wider question was discussed, because to commit the offence of rape the characteristics of an unchaste and a violent disposition must be combined.

On the other hand, in Bell V. Comm.,[2] the accused was charged with theft of chickens. An offer of the accused's reputation for "good moral character, for truth and honesty" was held properly rejected by the trial court because "truthfulness" was not relevant to the doing of the act charged, and was not admissible to support the defendant's credit as a witness. Rightly, the decision and reasoning in this case has been criticised by Wigmore as unsound. He said later that, "the court might well have held that if the defendant's guilt was plain on record, the rejection of this evidence did not harm; but the insistence on such quiddities in the definition of the rules of

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1) (1890) 15 S.W. 818, 819.
2) (1927) 222 Ky. 89, 300 S.W. 365

evidence simply tends to artificialise them out of all touch with the facts of human nature".

There are two other authorities, both from Texas, that make the point about "liberty to the defence" clearer. In Poyner V. State,[1] P. was indicted for incest, having been charged with seducing his niece. A defence witness was asked about P.'s "general reputation for gentlemanly deportment and good moral character", but this question was not allowed, the trial court holding that the evidence must be confined to reputation for virtue and chastity. The Court of Appeals of Texas reversed the conviction, holding the evidence rejected to be pertinent to the issue.

An even stronger case is Johnson V. State,[2] where J., a negro was charged with an assault upon a "white" with intent to rape. J. offered that his general reputation was that of a peaceable negro and one polite to "whites", especially ladies. Later a state witness said that J.'s reputation as a law-abiding man was bad. The Court of Appeals of Texas observed that evidence should be restricted to the trait of character which is in issue, that is, it ought to have some analogy and reference to the nature of the charge. They held that it was wrong to permit the proseuction to investigate J.'s reputation as a "law-abiding man" when he had not put it as such in issue. Looking at the facts of this case, it is obvious that the contrast with Winfield's[3] case is striking. If I may just review quickly the fact of R V. Winfield with particular regards to the question asked, the point will be clear. W. was indicted for indecent assault, and he

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1) 48 S.W. 516
2) (1885) 17 Tex. 565, 573
3) 27 Cr. App. Rep. 139

produced a defence witness to character, and her examination-in-chief proceeded as follows: Questioned, "Have you ever known me misbehave myself before ladies or with ladies? Tell the court with regard to my character and behaviour", to which the answer, "Most exemplary ..." was given. The point of contrasting the two cases is simply that, one could infer from the court's decision in Johnson V. State[1] that, had Winfield been tried in Texas, he would have had the option to put his general reputation as a law-abiding man in issue, but if he confined the evidence to his behaviour towards ladies (as he did) the prosecution could only attack his general character for virtue and chastity. In other American jurisdictions, there is no such option open to the prisoner, and there seems to be no common law authority conferring such an election upon the accused. In most American jursidictions, as earlier cited cases have shown, the prisoner, if on trial for an offence must confine his character evidence to the relevant trait. For example, State V. Thompson,[2] where T. was charged with indecent assault the trial court refused to allow T.'s counsel to ask a defence witness as to T.'s general reputation as a law-abiding man, with special reference to his "personal" morality. The Supreme Court of Uttah affirmed that the inquiry must be restricted to the particular trait in issue, that is, sexual morality, though they noted that the doctrine was not of universal acceptance in all jurisdictions. - (A reference to the Texas practice just noted where the accused has an option of putting forward his general

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1) (1885) 17 Tex. 565, 573
2) (1921) 199 Pac. 161, 165

reputation or restricting it to the character trait relevant to the offence charged).

Similarly, in State V. Moyer,[1] a case involving embezzlement, the accused's character for honesty was held admissible; while in Harper V. United States,[2] where the accused was charged with false entry in a bank report, the court held that the accused's character for "morality and sobriety" should be excluded.

It seems clear from all that has been said above, that there is sufficient authority that at common law the cross-examination of witnesses as to the accused's character must be confined to the character trait, relevant to the offence charged. One should also note that, as a matter of fact, the decision of R V. Winfield,[3] is only a dictum, as Winfield's conviction was quashed on another ground, it was because the jury had been inadequately directed with regard to corroboration. Infact, I will like to submit further that, not only should the evidence trait to be admitted be seen to be relevant to the crime charged, but also the circumstances in which the crime is alleged to have been committed should be considered also. So, if for example, a murder was committed with a hammer, character for peace and quiet on the one hand and for violence on the other will be admissible; but I would not think that such evidence should be admissible if the murder case was for slow-poisoning. I hope one could conclude by saying that despite the contrary statement in R V Winfield, there is a procedure known to the common law of putting part of the prisoner's character in issue; indeed the common

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1) (1905) 58 W. Va. 146, 52 S.E. 30
2) (1909) 8th C.C.A, 170, Fed. 385, 390
3) 27 Cr. App. Rep. 139

law prevents him from leading evidence as to any part of his character that is not relevant to the crime charged.[1] Although there is no decisive common law authority, the prosecution should in principle, be similarly confined as in the United States.[2] I think such a principle amounts to a reasonable and merciful dispensation to the accused of hitherto unenviable life to disallow any such opening of the door to his whole character without confinement. It is a far more dangerous move to open the door than might at first glance be assumed, because very few people could boast of a blameless life.

We can now go on to consider the last of the difficult issues with regard to the cross-examination of character witnesses, and that is the issue of the accused previous convictions. Generally speaking, previous convictions may not be proved against the accused as facts relevant to the issue because they amount to nothing more than evidence of disposition and can have no additional relevance in the absence of evidence concerning the facts on which they were founded. However, on the other hand, two things must be noted and could be regarded as general exceptions to the principle just stated above. First, it is clear that in criminal cases a conviction of the accused may always be proved when it is a fact in issue, as would be the case on a plea of autrefois convict. The second as highlighted by Phipson[3] is that character witnesses called by the defence may be cross-examined not only as to his own, but also the accused's previous conviction,[4] and whatever answers the witnesses give may be

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1) R V. Turner (1817) 32 St. Tr. 957
2) State V. Bell (1928) 221 N.W. 521; Comm V. Maddocks (1910) 207 Mass, 152, 93 N.E. 253
3) See Phipson On Evidence § 531 (12th ed.)
4) See V. Redd (1923) 1 K.B. 104

contradicted by other evidence. So in effect, one can say that the fact that an accused has been convicted may be elicited on cross-examination, and if denied it may be proved by other evidence under section 6 of the Criminal Procedure Act, 1865.

Before going further in the present discussion, I will like to restate briefly some earlier mentioned rules of common law, which are available in statutory provisions in some common wealth countries, because the rules are closely linked with the present discussion. Section 68 (1) of the Nigeria Evidence Act,[1] provides that "except as provided in this section, the fact that an accussed person is of bad character is irrelevant in criminal proceedings". Section 68 (2) (a) and (b), and section 68 (3), create three exceptions to section 68 (1); only the first two of the three exceptions are however, relevant to the subject matter of the discussion. It states: "(2) The fact that an accused person is of bad character is relevant - (a) when the bad character of the accused person is a fact in issue; (b) when the accused person has given evidence of his good character". Section 68 (4) is actually the most material for the present purpose, but will be appreciated and understood better only when read along with the other provisions of the section. It provides as follows: "(4) Whenever evidence of bad character is relevant evidence of a previous conviction is also relevant". Similar provisions are contained in the Indian Evidence Act, under section 54[2], and the explanations (1) and (2) accompanying the section. It states: "In criminal

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1) Cap. 62, Laws of The Federation of Nigeria
2) This section was substituted for the original section by sec. 6 of the Indian Evidence Act 91872) Amendment Act, 1891 (3 of 1891).

proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1 - This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2 - A previous conviction is relevant as evidence of bad character". One can easily identify the close similarities in the sections under the two statutes quoted above, and I have found it necessary to state the provisions fully, for the reason earlier mentioned - that is, to provide a good understanding of the relevant part of the section. It is thus clear, from all that has been said above that when evidence of bad character becomes relevant either on account of the tender of evidence of good character by the accused or on account of bad character being itself in issue, a previous conviction of the accused, becomes relevant as evidence of bad character; and the position is the same under the common law. Leaving for the moment the circumstances under which the bad character of the accused may be a fact in issue, since it has earlier been discussed, we can now consider the issue regarding the cross-examination of character witnesses for the accused, as to the accused's previous conviction; there will still be more discussion about the issue under the provisions of section 1 (f) of the Criminal Evidence Act, 1898.

First, by way of comment, I will like to make some observations on the material provisions of the relevant section cited from the Evidence Acts above. As noted earlier on, section 54 of the Indian

Evidence Act is an amendment; the section, as it stood before its amendment by section 6 of Act 3 of 1891 departed from the rules of English law and treated previous conviction of any offence as relevant in all cases. It appears the amendment was in consequence of the decision in R V. Kartick Chandra[1]. This section as it stood originally ran thus: "In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant unless....." (The remaining portion was the same as now, up to explanation 1). So the previous section, while it excluded evidence of bad character in the first instance, treated previous conviction of any offence as relevant in all criminal cases, with a view to prejudice the accused or to suggest an inference as to his guilt with regard to the offence charged. The reason for this departure from the salutary rule of English law as given in the First Report of The Select Committee - (Indian Parliament) was that the authors of the Act were unable to see why a prisoner should not be prejudiced by such evidence when true. However, it is note-worthy that in spite of the clear wording of the former section, evidence of previous conviction was not admitted in Roshan Dosad V. R,[2] where it was held that except under very special circumstances, the proper object of using previous conviction is to determine the amount of the punishment to be awarded should the prisoner be convicted of the offence charged.

An important case under the section as it then stood, is R V. Kartick

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1) 14 C. 721
2) 5 C. 768; see also R V. Shiboo, 3 W.R. Cr. 38; R V. Phul Chand, 8 W.R. Cr. 11; R v. Thakoordas, 1 W.R. Cr. 7

Chandra,[1] in which a Full Bench of The Calcutta High Court held that evidence of previous conviction was in all cases admissible to prove the guilt of the accused person. Pigot, J., in delivering his judgement observed: "We are constrained to answer this reference by saying that previous convictions are in every case admissible. That must be the law so long as this section remains unaltered. We own that, could we come to any other conclusion, we should have done so; but it is our duty to carry out the intentions of the legislature". It was in consequence of the decision that the section was amended by Act 3 of 1891; the present section is in accordance with the English rule, and also the view expressed in Roshan Dosad V. R,[2] cited above. A case decided on the present provision is Teka Ahir V. R,[3] in which the court held that, evidence of previous conviction amounts to evidence of bad character and is not admissible unless and until accused produces evidence of good character.

Another observation I will like to make applies to the Nigerian Evidence Act, which states that "'character' means reputation as distinguished from disposition;[4]..... evidence may be given only of general reputation, and not of particular acts by which reputation is shown". I suppose one could say that the foregoing definition is supplemented by section 68 (4) of the Evidence Act, which provides that "whenever evidence of bad character is relevant, evidence of a previous conviction is also relevant;" this is because, as I mentioned in the opening paragraph of this discussion, previous conviction amounts to nothing more than evidence of disposition.[5] One

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1) 14 C. 721
2) 5 C. 768
3) 5 P.L.J. 706: 60 I.C. 331
4) See ante;
5) See ante; see also Cross On Evidence, 5th ed. at p. 355 and p. 403

other comment I want to make, would apply to the Evidence Acts cited above and other common law jurisdictions. The common-law, and the provisions of section 68 (4) of the Nigeria Evidence Act, and section 54, explanation (2) of the Indian Evidence Act, in so far as they tend to define the "bad character" of an accused person as meaning a previous conviction of that accused person for an offence, are misleading, because a previous conviction by a criminal court is clearly distinguishable from the character of the person convicted, for a conviction is the legal consequence of particular conduct. Probably the only reason why the Act, following the English common-law practice, makes a previous conviction admissible in proof of bad character is that this consequence of conduct is a recorded fact which can be conclusively proved, whereas conduct is easily disputable.[1]

Going back to the actual disposition, I wish to stress that it is absolutely clear that after an accused has attempted to adduce evidence of his good character in his own defence, the prosecution may in rebuttal offer as evidence his bad character; and it is clearer still, that such bad character includes previous convictions. In other words, strictly speaking when evidence to prove good character has been adduced on the prisoner's behalf, the whole question of his character good or bad is opened, and evidence with regard to it, including evidence of previous convictions may be given in reply,[2] but evidence of particular acts on his part which have not resulted in a conviction is not admissible.

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1) See Noakes, An Introduction to Evidence, at p. 105
2) See Cross on Evidence, 5th ed. at p. 407

As pointed out in an earlier discussion, it was originally disputed that where defence witness gave evidence of accused good character, the prosecution was prohibited from replying by giving evidence of his bad character;[1] but as we know, the established and correct position is that the prosecution is invested with the right to offer evidence of bad character when the accused elicits evidence of good character by cross-examination of the prosecution witnesses or by himself giving evidence to that effect. It has been noticed[2] that successive editions of Archbold[3] have contained a statement to the effect that: "If the defendant endeavours to establish a good character, either by calling witnesses himself, cross-examining the prosecution witnesses or by himself giving evidence to that effect, the prosecution is at liberty in most cases to prove his previous convictions". Although originally this passage is based on cases turning on special statutes as evidenced in R v. Shrimpton,[4] and in R V. Gadbury,[5] this passage was approved by a dictum in R V. Redd,[6] a case to be considered subsequently. Cross,[7] says that in the absence of any judicial expression of doubt on the subject, it may be assumed that any character witness in any criminal proceedings may be asked about a previous conviction of the accused; and that as a matter of strict law, his previous convictions may it seems be proved in rebuttal, and I do share this view, which I hope will be confirmed as the discussion progresses. One of the special statutes of the 19th century on which the above statement by Archbold is based is the Previous Convictions Act, 1836, and it will be necessary to discuss

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1) See ante
2) Cross On Evidence, 5th ed. at p. 407
3) 40th ed. para. 558
4) (1851) 2 Den. 319
5) (1838) 8 C.&P. 676
6) (1923) 1 K.B. 104
7) Cross On Evidence, 5th ed. at 407

the two leading cases listed above, which were decided upon the provisions of the Act. Starting with R V. Shrimpton,[1] which was a trial of a prisoner for larceny, one of the witnesses for the prosecution, in answer to questions by prisoner's counsel stated that he had known the prisoner six or seven years, and that he had borne a good character for honesty. The counsel for the prosecution thereupon claimed, under the provisions of the statute,[2] to give evidence of the previous conviction of the prisoner in 1838. This evidence was objected to by the prisoner's counsel as inadmissible, first, because the evidence of the good character of the prisoner elicited from the witness R., was confined to the period between the years 1844 and 1851, and therefore evidence of the prisoner's conviction in 1833 was not in answer hitherto; secondly, because R., being a witness for the prosecution only, the prisoner did not, by the answers of R. to questions put to him in cross-examination give evidence of his (the prisoner's) good character within the meaning of the statute.[3] The court overruled the objection, and the conviction of the prisoner in 1838 was thereupon given in evidence before the verdict was returned. The prisoner was found guilty and sentenced to nine months' imprisonment, but the court of Quarter Sessions reserved for the opinion of Her Majesty's judges the question of law whether, under the circumstances above stated, proof of the said previous conviction of the prisoner was properly received in evidence before the verdict of guilty was returned. The Court held that the previous

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1) (1851) 2 Den. 319
2) 14 & 15 Vict. C.19 Sec. 9
3) See ante

conviction was admissible under 6 & 7 Will. 4, C.111, and 14 & 15 Vict. C. 19. The words of the legislature are, "that if, upon the trial of any person for any such subsequent offence as aforesaid, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall have been returned and the jury shall inquire concerning such previous conviction or convictions, at the same time that they inquire concerning such subsequent offence". Lord Campbell, C.J., [1] commented on this, that "The object of the legislature was to defeat the scandalous attempt often made by persons, who had been repeatedly convicted of felony, bringing witnesses, or cross-examining the witnesses for the prosecution, to prove that the prisoner had previously borne a good character for honesty. The mischief is as great whether such evidence be elicited from the witnesses for the prosecution or from those who are called on the part of the prisoner. Indeed greater; for the jury are more likely to be deceived by evidence in favour of the prisoner which falls from the witnesses from the crown. The enactment would have been defective, if it had allowed evidence of good character to be given, and not the evidence of bad character also. The question then is, did the prisoner in this case give evidence of good character so as to render it lawful for the prosecutor to offer the previous conviction in evidence? It seems to me, that the natural and necessary interpretation, to be put upon the words of the statute is, that if,

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1) (1851) 2 Den. 319 at 389

either by calling witnesses on his part, or by cross-examination of the witnesses for the crown, the prisoner relies upon his good character it is lawful for the prosecutor to give the previous conviction in evidence". The only comment I can make about Lord Campbell's speech is that, it must have put the whóle problem about the cross-examination of character witnesses as to the accused's previous conviction beyond argument. It is however, important to take notice of the valuable contribution made by Alderson B., in the same case, he said, using the now familiar words: "You say he is not likely to have committed this offence, because he is a man of good character; then, in answer to that, they say he is likely, because he is not a man of good character;" to achieve that, evidence of his bad character has to be adduced, which includes evidence of previous convictions.

A similar question as that dealt with in R V. Shrimpton,[1] was raised in R V. Gadbury,[2] and a similar decision was also given. Here, the prisoner was indicted for breaking and entering the dwelling house of one James Chamberlain, and stealing a veil, a hankerchief and things like that. Mrs Chamberlain stated, that she saw the window of her room down, but not fastened, at 10 am, and the property was not missed till between five and six pm; and that a person had been in her room several times in the course of the day. A woman in whose house the prisoner lodged at the time of the robbery, stated that he had lodged there for a fortnight previous. She was asked, on

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1) (1851) 2 Den. 319
2) (1838) 8 C.&P. 676

cross-examination, whether she had not herself taken the house only a fortnight before, and whether the prisoner was not living there at the same time, and was not recommended to her as a lodger by the previous landlord, of whom she took it? She replied in the affirmative. The prisoner was found guilty of larceny only. He was then charged with having been previously convicted of felony; having been found guilty on this part of the indictment. Parke, B., (after referring to the statute 6 & 7 Will, IV. C.111, entitled "An Act to prevent the fact of a previous conviction being given in Evidence to the Jury on the case before them except when Evidence to Character is given"), observed, that there had been one question put in cross-examination by the prisoner's counsel, as to which he had some doubt, whether or not the object in putting it was to show that the prisoner had borne a good character; and in his opinion, if a prisoner's counsel cross-examined the witnesses for the prosecution in order to show that the prisoner had borne a good character, it would be the duty of the court to direct that the evidence of the previous conviction should be given in the first instance. But, as he was in doubt whether the object of the prisoner's counsel in the present case was such, he had not thought it right to do so. The counsel for the prisoner stated that the object he had in view was only to show that the prisoner had been living in the same house longer than the witness had stated; and not to show that he had borne a good character. He admitted that under the words of the statute, which were "shall give evidence of his or her good character", the rule should be the

same whether such evidence was obtained by cross-examintion or otherwise. Concurring with this view, Parke, B., said in his judgement: "Yes; the words are, 'shall give evidence', and not shall call witnesses; and I am of opinion, that the rule should be so laid down, and it is important that in future it should be understood to be so, and should be generally known". It should be noted that a similar remark was made by Alderson, B., in R V. Shrimpton,[1] where he said: "The words of the statute are 'give evidence' - not 'call witnesses', - and the two certainly are not equivalent". The significance of this dicta, is evident when one attempts the interpretation of the relevant sections of the Acts,[2] I have referred to where similar phrases are used. In other words, the following words under section 68 (2) (b) of the Nigeria Evidence Act: "when the accused person has given evidence of his good character"; and a similar provision under section 54 of the Indian Evidence Act which states: "Unless evidence has been given that he (accused) has a good character", should not be interpreted in a limited sense only to mean that, unless evidence of good character has been given by witnesses called on the accused's behalf, but evidence of good character would also be dimmed given where the accused elicits evidence of good character by cross-examination of the prosecution witnesses too. It is abundantly clear that in either situation, the witesses may be cross-examined as to the accused's previous conviction.

Another important question was raised in R V. Shrimpton,[3] to the

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1) (1851) 2 Den. 319
2) Sec. 68 (2), Nig. Evidence Act: sec. 54 Indian Evidence Act
3) (1851) 2 Den. 319

effect that: "Suppose a witness, under cross-examination, should of his own accord give evidence as to the prisoner's good character, would that let in the previous conviction?" To that question, not much was said in answer by Lord Campbell, who cautiously retorted by saying: "That would be a different question. I would think, at present, that in that case I should not admit the conviction". The question, however came up undiluted in R V. Redd,[1] and the court rose up to it decisively, saying that, a prisoner cannot be said to be endeavouring to establish a good character merely because a witness whom he called voluntarily and probably against the prisoner's own desire, made a statement as to his good character and that does not entitle the prosecution to question the prisoner as to his previous conviction. The facts are as follows, an appellant, who was tried for house-breaking and robbery, called a witness for the purpose of producing certain letters. This witness, without any question being put to him by the appellant, voluntarily made a statement as to the appellant's good character. The counsel for the prosecution then claimed that as evidence of the appellant's good character had been given he was entitled to cross-examine the witness as to the appellant's real character, and he thereupon proceeded to ask the witness as to the number of times the appellant had been convicted. The court held that the appellant was not under the circumstances endeavouring to establish a good character by calling a witness who voluntarily made a statement as to the appellant's good character, and that therefore the question as to the appellant's previous convic-

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1) (1923) 1 K.B. 104

tions were not admissible. Avory, J.,[1] in his judgement said: "The question we have to determine is whether the suggestion of the previous bad character of the appellant was properly put before the jury. So far as the evidence given by the witness Williams is concerned the Criminal Evidence Act, 1898, has no application, but it does not fall within the authority of R V. Gadbury.[2] In the opinion of the court, the rule in that case is correctly stated in Archbold's Criminal pleading[3] as follows: 'If the prisoner endeavours to establish a good character, either be calling witnesses himself or by cross-examining the witnesses for the prosecution, the prosecution is at liberty in most cases to prove his previous convictions'. The question is whether the appelllant was within the meaning of that rule endeavouring to establish a good character. In the opinion of the court, he was not endeavouring to establish a good character merely because a witness whom he called, voluntarily and probably against the appellant's own desire, made a statement as to the appellant's good character ....." I would like to add by way of comment that there is a distinction between R V. Redd[4] and R V. Gadbury, in the sense that the issues adjudicated upon in both cases though may be similar are quite different. It has been suggested that R V. Redd[5] followed R V. Gadbury[6], but for some reasons I think Gadbury's case cannot be taken as a precedent in R V. Redd. Redd's case could be charged to have erroneously indicated that the rule in Gadbury's case is correctly stated in the passage in Archbold, because R V.

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1) (1923) 1 K.B. 104 at Pp. 106-107
2) (1838) 8 C.&P. 676
3) 40th ed. Para. 558
4) (1923) 1 K.B. 104
5) (1923) 1 K.B. 104
6) (1838) 8 C.&P. 676

Gadbury, and R V. Shrimpton are merely interpretations of the Previous Conviction Act, 1836. Even though the passage in Archbold was cited and approved by the Court of Criminal Appeal in R V. Redd, the remarks were obiter as the court held that the accused had not put his character in issue; the passage in Archbold has not passed unnoticed by Stephen,[1] and it has been pointed out that Gadbury and Shrimpton, are of course not authority for the wide proposition laid down in the passage. It is interesting to note that the accused's counsel in R V. Redd, cited R V. Gadbury to the court, not, curiously enough, to show that the passage in Archbolld was misconceived, but merely as an authority that on the facts in Redd, the accused had not put his character in issue. It is significant to note that in Canada, the effect of the decision in R V. Redd has since been overruled by section 573 of the Canadian Criminal Code. As a matter of fact, R V. Triganzie,[2] had actually ruled long before it, against the admissibility of a conviction to rebut the evidence of a witness to character at common law, and this signifies a significant parity within the common law system. However, as I said earlier on in the discussion, I share the view expressed by Cross[3] that as a matter of strict law accused's previous convictions may it seems by proved in rebuttal, and even though I agree that Gadbury, and Shrimpton cannot be said to have been confirmed by the passage in Archbold as they were decided upon a special statute, they undoubtedly serve as a guideline. There is also a distinction to be marked between Gadbury's case and Redd's case. In R V. Gadbury, I would think that

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1) A Digest of the Law of Evidence, 12th ed. (1948) 202
2) (1888) 15 O.R. 294
3) Cross On Evidence, 5th ed. at p. 407

the decision was to the effect that where the object of a defence question was not to elicit evidence of good character, but an innocent mistake was made on the part of the witness and in his answer gave evidence of the accused's good character, the prosecution would not be allowed to give evidence of bad character of the accused by asking questions about his previous conviction Gadbury's case to my mind, shows the importance to be attached to the intention of the defence counsel in his questioning, - we should ascertain the object of his question, and where an inadvertent mistake was made about the intention or object of the question, it should not be used against the accused. On the other hand, I see the decision in R V. Redd[1] in a rather different light, because here, there was no qualm or misgiving about the object of the question, but the witness intentionally, out of his own volition and without any prompting whatsoever, gave evidence of good character of the accused; this was wholly a voluntary act, it was not accidental, and there, I believe lies the basic and fundamental difference in the two cases. So if I may put it this way, the distinction is that while R V. Gadbury[2] prohibits allowing the accused to suffer for a confusion that might have arisen from his or from the mind of the witness, R V. Redd, forbids the punishment of the accused for an act he could not be said to support or desire, and so should not be responsible for the consequence. Another case which emphasises the need for 'voluntariness' is R V. Beecham.[3] In this case, the court gave a decision to the effect that, a statement not

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1) (1923) 1 K.B. 104
2) (1838) 8 C.&P. 676
3) (1921) 3 K.B. 464; 90 L.J. K.B. 1370.

voluntarily made by an accused but extorted by repeated questions in cross-examination cannot be treated as evidence given by accused of his good character and does not justify the prosecution in letting in evidence of his previous convictions.

In Scotland,[1] there are similar cases involving the type of issues as those discussed above, and it is interesting to note that the scottish cases are decided on special statutes, of a different kind from those discussed above though. I will like to start with the case of Kepple V. H.M. Advocate,[2] in which the court held that accidental or incidental reference by a witness to a previous conviction may not necessarily be fatal to a conviction. This decision was based on the provisions of section 67 of the Criminal Procedure (Scotland) Act, 1887, which enacts: "Previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned"; in the case, an accused was tried on an indictment which set forth that he had assaulted his wife, and had previously evinced ill-will and malice towards her. In the course of the trial the accused's wife gave evidence. The prosecutor asked her: "Will you tell us when he threatened to do you in, any of the date?" The witness answered: "On two previous convictions of thirty days, he go he threatened me. He said he would swing for me". In its judgement, the court held that this answer did not contravene the provisions of section 67, (stated above) in respect that it was given in reply to a competent question not involving any reference to

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1) See Walker and Walker, § 22; Rention & Brown § 10: 07 Anon "Disclosure of Previous Convictions" (1960) 76 S.C.L.R. 169

2) (1936) J.C. 76. See also Deighan V. Macleod (1959) J.C. 25; Smith V. H.M. Advocate (1975) SLT (Notes) 89; Millar V. H.M. Advocate 6 May 1976 unreported

previous convictions; and as such, the appeal against the conviction was dismissed. I find it necessary to consider some aspects of the Lord Justice-General's (Normand) judgement. He said:[1] "The first question is whether a reference to previous convictions, occuring in the evidence in chief of a witness for the crown, but not brought out in response to a question so framed as to elicit such a reference, may invalidate the verdict. The answer to this question depends on section 67 of the Criminal Procedure (Scotland) Act, 1887,[2]. The material words are .. .. (as stated above.) It is clear that previous convictions cannot be laid before the jury by a witness on his own initiative but only by the prosecutor or by the judge, and the first limb of the prohibition is therefore addressed to the prosecution and to the presiding judge. In my opinion, the prohibition against referring to previous convictions is likewise addressed to the presiding judge and to the prosecutor. The section not only forbids a reference to previous convictions by the judge and prosecutor themselves, it also forbids any question by them which deliberately or carelessly suggests to the witness an answer referring to previous convictions, and it lays on the judge a duty to prevent, if he can, a witness from making any ultroneous reference to a previous conviction. If, however, in answer to an innocent question, a witness blurts out a reference to a previous conviction, the prohibition is not infringed". It should be noted that section 67 of the Criminal Procedure (Scotland) Act, has come under judicial

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1) (1936) J.C. 76 at 79
2) 50 & 51 Vict. Cap. 35

consideration in several reported cases. In none of them did the question now at issue - (as in Kepple V. H. M. Advocate)[1] fall to be decided; but in some of them dicta occur which bear on the question. For example, in Corcoran V. H. M. Advocate[2], Lord Anderson said:[3] "I consider that the purpose of the enactment was to ensure that a case should be presented to the jury as if it were a first offence. The statute interpels the prosecutor and judge from doing or saying anything, or leading a witness to do or say anything, which would convey to the jury that the panel had been previously convicted of crime. The accused, or the agent or counsel who represents him, may, during the trial, bring out the fact of a previous conviction, but disclosure so made can never furnish a ground of attack on a conviction". It is thought that that statement of the law is correct. However, Lord Ormidale in the same case said[4]: "I am content to take a broader view of the meaning and effect of the section, to consider its spirit rather than its precise phraseology, and to treat as within its ambit anything said and done in the course of the trial which, although indirectly, necessarily brings to the mind of the jury the fact that the panel has been previously convicted". In Kepple V. H. M. Advocate, the Lord Justice-General (Normand)[5] commented on the view of Lord Ormidale in the following words: "This passage was founded on as if it were to be taken as Lord Ormidale's considered opinion on the meaning and effect of the section. I think such a view is erroneous, and that, when the whole context is examined, it is apparent that Lord Ormidale meant that, even if it were

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1) (1936) J.C. 76
2) (1932) J.C. 42; See also Cornwallis V. H.M. Advocate, (1902) 3 Adam 604, Lord Kyllachy
3) (1932) J.C. 42 at 49
4) Ibid at 47
5) (1936) J.C. 76 at p. 80

conceded that the broader meaning and effect should be given to the enactment, he would not in the case before him hold that it was transgressed. But, whatever be the meaning of the particular passage in his Lordship's opinion, I cannot hold that something said by a witness, voluntarily, and under circumstances which prevent the presiding judge from intervening before the mischief is done, is an infringement of the section if it discloses that the panel has been previously convicted. So to hold would be to open an easy way by which a witness favourable to the panel might afford ground for challenging a verdict of guilty". The later case of Haslam V. H. M. Advocate[1], which was also decided on the provision of section 67 of the Criminal Procedure (Scotland) Act, 1887, reviewed and subtly criticised the decision of Kepple V. H. M. Advocate[2]. The facts of Haslam V. H. M. Advocate are as follows; at the trial of an accused, upon an indictment which set forth charges of obtaining board and lodging and money by fraud, a police officer stated in evidence that, at the police station, the accused had given his name as John Goodchild, and on being charged, "at first" had denied all knowledge of the offences. The witness further deponed: - "Then I asked him if his name was John James Haslam and he said no. Then I compared the wound on his hand". Before the witness could proceed further the prosecutor interposed this question:- "(Question); He later admitted that he was John James Haslam? (Answer) Yes". The accused was convicted. The court held that the reference in this evidence to the

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1) (1936) J.C. 82
2) (1936) J.C. 76

name and the wound on the hand of the accused did not necessarily lead to the inference that he had been previously convicted, and the appeal against the conviction was dismissed. Lord Justice-Clerk (Aitchison) in his judgement made certain remarks worth mentioning.[1] He said, (after citing the provision of section 67 of the Criminal Procedure (Scotland) Act): "....Now in the recent case of Kepple certain observations were made by the learned judges which may seem to limit the application of that section to cases where previous convictions are laid before the jury, or are referred to before the jury by the presiding judge or by the prosecutor. I am not satisfied that a restricted meaning ought to be given to the section. When a reference is made to a previous conviction by an officer of police, who ought to know better, it is obviously prejudicial to a fair trial, and I have difficulty in understanding why it should be thought not to amount to a contravention of section 67. The purpose of section 67 is to ensure that an accused person shall be fairly tried, and an accused person is not fairly tried if a police when he gets an opening in a question inadvertently addressed to him, makes a reference, direct or indirect, to the record of the man who is standing his trial. It may be for consideration whether the case of Kepple has not gone too far, and I desire to reserve my opinion upon the point". I would just like to say that I identify with the views expressed by Lord Justice-Clerk Aitchison with regards to Kepple, as to the provision of section 67 of the 1887 Act[2]. Another interesting case to consider is Clark V. Connell,[3] which was decided under a new

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1) (1936) J.C. 82 at 85
2) Criminal Procedure (Scotland) Act, 50 & 51 Vict. Cap. 35
3) (1952) J.C. 119

statutory provision - section 46 of the Criminal Justice (Scotland) Act, 1949. The Criminal Justice (Scotland) Act, 1949, by section 46 (2) enacts that section 34 of the Summary Jurisdiction (Scotland) Act, 1908, in so far as it requires previous convictions to be set forth in a summary complaint, shall cease to have effect, and, further, that "no such previous conviction shall be laid before the judge in any proceedings on such complaint until the judge is satisfied that the charge is proved.....". The facts of the case are as follows, the accused, William McIntyre Connell was charged in the Sherrif Court at Dundee on summary complaint with a contravention of section 15 of the Road Traffic Act, 1930. A police surgeon gave evidence that on apprehension the accused had been medically examined and that, inter alia, his handwriting had been compared with his signature on his driving licence. The Sherrif-substitute then asked for production of the licence, for the purpose of himself comparing the handwriting thereon with the handwriting obtained by the police surgeon; and the licence was produced by the prosecutor. While examining the licence, the sherrif-substitute inadvertently became aware that it contained an endorsation although he had no knowledge of the nature of the endorsation beyond the fact that it must have related to a conviction under the Road Traffice Acts. At the conclusion of the evidence objection was taken by the accused's solicitor to the competency of the procedure, in respect that a previous conviction had thus been laid before the sherrif-substitute and, the

sherrif-substitute sustained the objection. The court held that section 46 (2) of The Act of 1949 was concerned solely with previous convictions of offences forming an aggravation of the offence charged, and that, as the sherrif-substitute had remained unaware of the nature of the endorsation, the accused had not been prejudiced in his defence by the procedure followed, and the objection should have been repelled. I will like to draw attention to some of the significant observations made by Lord Justice-General (Cooper) in his judgement. He said:[1] "This stated case raises an interesting question with regard to the application of the provisions of The Criminal Justice (Scotland) Act, 1949, with reference to previous convictions. There are two provisions in that Act - section 39 dealing with previous convictions in proceedings on indictment, and section 46, dealing with previous conviction in summary proceedings. It is with the second of these sections that we are alone concerned, ... By section 67 of The Criminal Procedure (Scotland) Act, 1887, provision was made as regards the non-disclosure of previous convictions to juries, and we are, of course, familiar with the rule thereby laid down and with the beneficial purpose which its application secures. The first observation I would venture to make is that there is a significant difference between the language used in section 46 of the new Act and in section 67 of the Act of 1887, and I think this distinction must be borne in mind when considering the observations of learned judges made before 1949 as to the effect and purpose of section 67 of the Act of 1887. There is also this to be said, that,

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1) (1952) J.C. 119 at 122.

if the new provisions are read in the widest possible sense, they might result in the most remarkable consequences. Three illustrations occur to me. In the first place there are some habitual criminals who are known to practically all the judges who could possibly try them. Again, there are those who are known to some of these judges: and, if the judge who knows the accused has on that account to retire in favour of another judge, that other judge will inevitably infer the reason for the charge and will accordingly become acquainted with the fact that the accused has a previous record. Again, there is the case where an accused is charged on indictment with a relatively slight offence, from which any judge of experience would at once infer that the reason for an indictment was the previous bad record which stood against the accused. If, therefore, the sections were read as prohibiting the trial of an accused person by a judge who had from any source whatever acquired information that the accused had a previous record, we would have to impute to Parliament the quite incredible intention of granting a licence to some habitual criminals to commit crimes without the possibility of being brought to account in any criminal court which could try them. The difficulty could not even be met by the heroic expedient of appointing additional judges to try such cases, for the reasons for such appointments could not be concealed ..... Turning to an examination of section 46, I note that the operative directions are concerned with two matters - (first) what shall not thereafter be contained in a

complaint, and what shall be contained in a separate notice, and (second) what shall not be 'laid before' the judge until the charge has first been proved. It is with the second of these matters that we are concerned here. The words 'laid before' must in my view be read as meaning, at least primarily, 'laid before by the prosecutor', for I find it impossible to entertain the suggestion that the section would be satisfied if the forbidden information were 'laid before' the judge by the accused or his representative, for such a reading would afford a very simple and easy method by which any accused could escape conviction".

These observations made by Lord Justice-General Cooper are indubitably appropriate and useful.

It is pertinent to point out as evident from the discussion that the previous convictions alluded to in England, are those voluntarily divulged by the accused himself or his witnesses - i.e., witnesses called by the defence as to the accused's character while in Scotland, they are to the previous convictions inadvertently divulged by the prosecution witnesses. It should be made clear that if any of the cases came up in either jurisdictions they would certainly be decided in the same way. However, the pertinent question is, what is the significance of the difference between on the one hand previous convictions given by the accused or his witnesses and those given by the prosecution witnesses. The obvious answer is that the evidence of previous conviction given by the prosecution witness will be more frowned upon especially as it is prohibited to give evidence of the

accused's bad character in the first instance but less fuss would be aroused by evidence of previous conviction given by the defence witnesses not because in actual fact it would be less prejudicial, but rather as a result of natural human psychology. A parallel that one can draw is when the prosecution voluntarily gives evidence of the accused's good character, surely such evidence will carry more weight than when it is given by the accused himself - it is simple human logic. However, it appears that contrary to the view that I have just expressed, there is no significant difference between the evidence of previous conviction of the accused given by the prosecution or the defence witness. This point is buttressed by the attitude of the court when it happens, and it happens not infrequently that, because of some inadvertent reference in the witness-box, or the wrongful exposure to the jury of some document, part of the bad character of the accused, of which his previous conviction is a part, is unintentionally exposed to the jury, when it is not admissible for any purpose.

A number of examples have been highlighted in earlier discussion and we shall now consider how the problem is to be properly tackled when it arises. If, as may easily occur, a defence witness inadvertently says that he "first met the accused in prison", or a policeman is asked questions about why he chose to suspect the accused and answers by referring to the accused's past record, the problem arises whether the jury should automatically be immediately discharged. In

such a case, the judge has power to discharge the jury and order a new trial, if application is made to him on behalf of the accused affected, or presumably of his own motion. The question of discharge of the jury is in all cases one within the discretion of the judge. It by no means follows that the jury must in every case be discharged. The judge must weigh the gravity of the revelation to the case for the defence, and must take into account the prejudice and inconvenience which a retrial may cause. If the slip is inconsequential, or occurs in the course of a long trial and is likely to be forgotten by the jury,[1] or where the matter can be dealt with by a firm direction, it will be proper to continue. It would also be manifestly right to continue where the accused, seeing the trial go against him "inadvertently" lets slip something of his past record. Generally, the cases show a development. In R V. Peckham,[2] the Court of Criminal Appeal apparently laid down a rule that when a statement with regard to a prisoner's previous record is inadvertently made from the witness-box to his prejudice, and his counsel applies for the trial to be begun again before another jury, the court ought to discharge the jury and begin again. More recently, the Court of Appeal in R V. Weaver[3] has said that whether or not the jury should be discharged is a matter within the trial judges discretion on the particular facts of each case, and that an appellate court will not lightly interfere with the exercise of that discretion. Moreover, it is relevant for an appellate court to inquire whether the judge did all he could to dispel any prejudice to the accused arising from the

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1) As in R V. Coughlan & Young (C.A.) (1976) 63 Cr. App. R. 33, where the slip was "sensibly" ignored by all concerned, and mentioned later to the judge.
2) (1935) 25 Cr. App. Rep. 125; Cf R V. Firth (1938) 26 Cr. App. Rep. 148 and R V. Schipper & Fieret (1961) NZLR 852
3) (1968) 1 Q.B. 358

inadvertent reference to his past.[1] By way of illustration, trials have been allowed to continue when the appellant showed familiarity with the words of the caution when approached by the police, and a policeman had been obliged to disclose that the accused's address was known to the police;[2] and when one witness gratuitiously referred to the accused's statements, near the time of the commission of the offence, about having to go to court and to prison in respect of other indecent acts.[3] On the other hand, in R V. Knape,[4] The Supreme Court of Victoria held that the judge had erred in allowing a trial to continue after a defence witness had referred to meeting the accused at a prison farm, and by this answer, which was "unresponsive" to the question asked, had destroyed the whole strategy of the defence. There is no general rule that when one co-accused says something prejudicial about another the jury must automatically be discharged. It would make it too easy if a fair trial were not going well for one co-accused for another to obtain a retrial for him in this way.[5] But in general, it is submitted that the interests of justice require the discharge of the jury, the appearance of a fair trial being as important as the reality. It is difficult wholly to exclude the possibility that the jury will be influenced wrongly against the accused.

It should be pointed out that there are cases in which counsel for the prosecution may be aware, from the depositions or otherwise, of the possibility that one of his witnesses may blurt out something

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1) Ibid
2) Ibid
3) R V. Palin (1969) 3 Atl E.R. 689
4) (1965) V.R. 469, reviewing earlier Victorian cases. Cf R V. Campbell (1970) VR 120; R V. Boland (1974) VR 849; R V. Koppen (1975) 11 SASR 182; Prestage V. R (1976) Tas. S.R. 16.
5) R V. Sutton (1969) Crim. L.R. 435

indicating that the accused has previously been convicted of an offence. He should take precautions against this happening, and an accused's statement may, according to English authority, be "edited" to avoid prejudicing the prisoner. The best way for this to be done is for the evidence to appear unvarnished in the depositions. Then at the trial counsel can confer and judge can take a part in ensuring that any editing is done in the right way and to the right degree.[1]

The general rule that the accused's previous conviction should not be disclosed to the court before the verdict was examined by the Thomson Committee.[2] They considered the discussion of the issue in the Eleventh (11th) Report of the Criminal Law Revision Committee,[3] and in an article by Henry Brinton and Lord Fraser[4] and came to the conclusion that while certain circumstances might be considered as justifying some relaxation of the general rule prohibiting disclosure of an accused's previous convictions, it would not be practicable to frame a rule which would satisfactorily cover only those circumstances.[5] The Criminal Law Revision Committee's proposals for making previous convictions more widely admissible were widely criticised,[6] and the Thomson Committee took the view that these proposals were so prejudicial to accused persons that they themselves did not propose anything on these lines being introduced in Scotland.[7] It is submitted with respect that the Thomson Committee reached the correct conclusion. Recent research supports the view that the disclosure of the accused's record may significantly increase the chance of conviction. It was found in an American study

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1) R V. Weaver (1968) 1 Q.B. 353, 357-8; Cf R V. Moriarty (1969) Crim. L.R. 659. (2) see Thomson Rept Chap. 54. In civil law countries the accused's character and background, including previous convictions are regarded as fully admissible on the question of whether or not he is guilty; Williams, Proof of Guilt (3rd ed.) pp. 213-4; (3) CLRC, § § 70 - 101. (4) "Trial and Pre-trial Procedures (1971) 135 J.P. 827; (5) Thomson Committee Rept. § 54:07. (6) e.g BC, § 92 - 110, 338 H.L. Deb, 14 Feb 1973, Cols 1553,1577,1623,1632,1648,1661. (7) Thomson Rep. §54:07. For a comment on the severity of Thomson's criticism see J.E. Adams "An Englishman Looks at Thomson" (1976) Crim. L.R. 609.

that where the judge disagreed with an acquittal by a jury the most common differential feature was the jury's ignorance of the accused's previous record.[1] In England, the following conclusions have been tentatively suggested from the research of the London School of Economics Project. (1) The admission of previous convictions increases the chance of a guilty verdict, but only if those convictions are for offence similar to that charged. If they are dissimilar it is possible for them to have an effect that is positively favourable to the accused. Similar previous convictions may adversely affect the outcome for a co-accused. (2) Contrary to commom supposition, juries give real weight to an instruction to disregard a previous record wrongly admitted.[2] If similar convictions assist the Crown while dissimilar ones may favour the defence, it seems best that the jury should not be prejudiced in either direction by the disclosure of any convictions other than by virtue of section 1 (f) of The Criminal Evidence Act, 1898.[3]

(5) CHARACTER OF THIRD PARTIES

In criminal cases, the general character or reputation of the complainant is as a rule immaterial, and no evidence can be given of it. The prosecutor in criminal cases is not a party to the proceedings, and as such, except in so far as it may be elicited in cross-examination, his character may generally not be proved. For example, in R V. Wood,[4] the defendant was charged in the first count of the indictment with robbing one C. of £1.35 with violence, and in

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1) Kalven V. Zeisel, The American Jury (1966) p. 131, Table 31 cit Colin Taper (1973) 36 ML.R 56 at 57.
2) W.R. Cornish and A.P. Sealy. "Juries and The Rules of Evidence". (1973) Crim L.R. 208, at pp. 221-222.
3) See Ss, 141 (f) & 346 (f) of the (Scotland) Act of 1975; s. 159 (d) of The Nigeria Evidence Act; s. 1 (f) of the Criminal Justice (Evidence) ACt,- Ireland.
4) (1951) 2 All E.R. 112

the second count with assaulting C. thereby occasioning him actual bodily harm. During the cross-examination of C., counsel for the defendant asked whether on the night relating to the charge he made an improper suggestion to the defendant and committed an act of gross indecency against him. The prosecution, proposed to call evidence in rebuttal to prove that C. was a person of good general reputation. The defence counsel submitted that such evidence was inadmissible, arguing that to prove that he (C) was a person of good general reputation could only prejudice the jury in his favour against the defendant. The court held that in the circumstances, the evidence was not admissible.

There is an exception to the rule. Where a man is prosecuted for rape or an attempt to ravish, the position at common-law is that, the accused may adduce evidence in chief concerning the complainant's bad reputation for chastity.[1] The complainant may be cross-examined about her intercourse with other men and the accused; however, in the former,[2] but not the latter[3] event, her answers must be treated as final. The complainant may also be contradicted by other evidence if she denies that she is a prostitute or a woman who has demanded money after consensual intercourse.[4] The victim's character may be proved by the accused to establish provocation but not to justify the offence committed especially in homicide cases[5]. It is on these briefly described issues that the present discussion will mainly focus. It should be mentioned at this stage that in Scotland, there are some minor though important differences from the law of England and the

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1) R V. Clarke (1817) 2 Stark. 241
2) R V. Holmes (1817) L.R. 1 C.C.R. 344; Stokes V. R (1960) 105 C.L.R. 279
3) R V. Riley (1887) 18 Q.B.D. 481
4) R V. Bashir and R V. Manzur (1969) 3 All E.R. 692; R V. Krauz (1973) 57 Cr. App. R. 466.
5) R V. Bloqin (1920) 1 K.B. 213; R V. Macarthy, Russ. Cr. (8th ed.) 1931, note (b) & 1932 note (a).

Commonwealth regarding the extent of cross-examination of rape victims. These differences will be highlighted while considering the matter in further detail. By and large the law in England which obtains in most of the Commonwealth, bears a close similarity with the Scottish law. Under the Scottish law, the accused may if notice has been given attack the character of the injured person in cases of murder or assault,[1] and in cases of rape, attempted rape or similar assaults on women.[2] In Dickie V. H.M. Advocate,[3] the Lord Justice-Clerk observed that "where a woman maintains that she has been indecently attacked, it is competent, upon notice being given, to attack her character for chastity, and to put questions to her involving the accusation of unchastity". In other words, if the person accused intends to attack the character of the person whom he is charged with injuring - if, for example, he is to prove immorality on the part of the woman in a charge of rape, or quarrelsome disposition on the part of the person assaulted - he must give notice of his intention to the prosecutor and to the court. However, in one murder case, notice was given of intention to attack the character of the deceased, but this seems to be unnecessary;[4] it has not been unusual to take special recognition of the particular circumstances of a case in order to waive the general rule which requires notice to be given.[5] In Falconer V. Brown,[6] it was held that a complainer or the victim may be cross-examined, apparently without notice, as to his insobriety at the time of the assault, and that evidence may be led for the defence

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1) H.M. Advocate V. James Irving, (1838) 2 Swin. 109
2) H.M Advocate V. Walter Blair (1844) 2 Brown 167; H.M. Advocate V. Allan, 1 Brown, 500
3) (1897) 24 R. (J) 82, at 83, see also at 87
4) H.M. Advocate V. Peters and Others (1969) 33 J.C.L. 209
5) H.M Advocate V. Kay (1970) S.L.T. (Notes) 66.
6) (1893) 21 R. (J) 1.

regarding it. Having stated some of the general principles, we may now consider in detail the rules under some specific offences. It should be mentioned that in actions for malicious prosecution or false imprisonment, the bad character of the plaintiff is not admissible to show reasonable and probable cause on the part of the defendant.[1] And in civil cases, if the character of a third party were in issue or relevant to the issue, it could no doubt be proved as there are no special exclusionary rules that might be applicable.

In a case of homicide, when the accused has produced evidence that the deceased attacked him, - thereby grounding a claim of self defence, - this when met by counter evidence raises an issue of conduct. Naturally, in a case of this type, when the issue of self-defence is made in a trial for homicide, and thus giving rise to a controversy whether the deceased was the aggressor, one's persuasion and intuition will be more or less affected by the character of the deceased. It is almost universally held that when such situations arise, the accused may introduce evidence of the reputation of the deceased for turbulence and violence. In R V. Thomas Hopkins[2] on the trial of an indictment for murder, it was proved that the deceased rushed at the prisoner, her husband with whom she had been quarrelling, took his hat off, and caught him round the neck; and she then received a mortal wound inflicted by him with a knife which he had in his hand. To show the nature of the assault by the wife that the prisoner had reason to apprehend at the time, evidence of former attacks of this sort was allowed to be given; the prisoner was sensitive about the

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1) Newsman V. Carr, 2 Stark. 69; Cornwall V. Richardson, Ry. & M.. 305 Downing V. Butcher, 2 M.& Rob, 374.
2) (1886) 10 Cox 229; R V. Biggin (1920) 1 K.B. 213; R V. MaCarthy, Russ. Cr. (8th ed.) 1931, note (b) and 1932, note (g).

neck from old sores, because the deceased used to seize his neckerchief, twist it round so tightly as almost to strangle him and his neckerchief had to be cut on one occasion to release him from his wife's violence. It is clear from the facts that the deceased woman was a strong, powerful woman, and also a very violent one; and the accused was apprehensive of a similar attack on the unfortunate occasion in question. The position is the same in Scotland [1] and in the commonwealth countries. In America, the law is no different as shown in Williams V. Fambro.[2] In this case, Stephens J., while admitting the turbulent character of a slave, as indicating that he was killed in an act of insurbordination as claimed by the defendant, W., said: "To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story where there is, as there was in this case other evidence suggestive of such an act. Such a story of the rebellion (as the defendant's) if told by a witness or indicted by circumstances ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in doubt, would want to know the character of the negro ..... (the defendant) William's knowledge or ignorance (of the character) has nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible in this case on the question of justification was from the negro's general readiness for

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1) Irving, (1838) 2 Swin. 109 ; Blair (1836) Bell's Notes 294; Fletcher (1846) Ark. 171
2) (1860) 30 Ga. 233, 235: State V. Wilson (1945) 235 Iowa, 538, 17 N. W. 2d. 138; Ball V. State (1929) 113 Tex. Cr. 58 S.W. 2d, 641.

rebellion, to render more probable the evidence which tended to show an act of rebellion at the time he was killed; and this probability is evidently not affected in the slightest degree by William's previous knowledge. The light comes from the fact that the negro was one who was apt and likely to do such an act as the one imputed to him, and not from William's knowledge of the fact". The main bone of the contention in the above decision is that, the character of the deceased may throw much light on the probabilities of the deceased's action. In Fields V. State,[1] the deceased's character as a 'violent, turbulent, revengeful, blood thirsty, dangerous man,' was held admissible for 'determining the turpitude of the crime and what should be the measure of the punishment to be inflicted'.

There is a difficult recurring problem with regard to the circumstances in which the accused may adduce evidence of the victim's character. Essentially, the problem is one of undue prejudice - protecting the prosecution against jurors improperly permitting an accused to go free because the person he victimised may have been an unsavoury individual. It has been vigorously argued that the character of the victim should always be immaterial since all men regardless of their character are entitled to equal protection of the law, and admission of this evidence creates a danger that the jury will improperly empathise with the defendant because of the victim's undesirable nature. While it appears that in the British Isles and the Commonwealth, most is left to the discretion of the judge, in the United States of America, to prevent undue prejudice to the

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1) (1872) 47 Ala. 603

prosecution, most states impose a condition precedent to the admissibility of the evidence.[1]

Ordinarily in a trial for homicide evidence of prior threats or the dangerous character of the deceased are inadmissible. However, if the accused claims the killing was in self-defence, it becomes incumbent on him to satisfy the jury that he acted in a reasonable belief that he was in imminent danger of life or limb at the time he perpetrated the homicide. Hence, his knowledge of the dangerous character of the deceased or threats on the accused's life made by him and communicated to the latter are admissible for this purpose. In most United States' jurisdictions the accused must introduce some proof of an overt aggressive act or hostile demonstration by the deceased before evidence of prior threats or the dangerous character of the deceased is admissible.[2] It is generally provided that in the absence of proof of hostile demonstration or overt act on the part of the person slain or injured, evidence of his dangerous character or of his threats against the accused is not admissible. An 'overt act' is deemed to mean a hostile demonstration of such a character as to create in the mind of a reasonable person the belief that he is in immediate danger of losing his life or suffering bodily harm; needless to say that the proof of such hostile demonstration must be made to the satisfaction of the court. I agree that there ought to be some appreciable evidence of the deceased's aggression, for the character evidence can hardly be of value unless there is otherwise a

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1) 1 Wigmore, § 111 at 552; 2 Wigmore § 246; Under the Federal Rules of Evidence however, no prerequiste is required to introduce evidence of the victim's character to show that he acted in conformity therewith. See Fed. R. Evid. 404 (a) (2) (1975)
2) 2 Wigmore, Evidence § 246

fair possibility of doubt on the point. Thus the purpose of the rule is to prevent the jury from becoming prejudiced in the defendant's favour where no situation which could even remotedly be termed "self-defence" is presented by the evidence. Thus by requiring preliminary proof of an overt act, the court demands some guarantee that the evidence will be employed for its proper purpose. Otherwise the deceased's bad character is likely to be put forward to serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often possible to obtain untrustworthy character testimony for that purpose. The rule for the prerequisite overt act has been applied whether the evidence is offered for the purpose of showing who was the aggressor or of showing the defendant's state of mind to prove the reasonableness of his apprehension. I would strongly recommend the rule to the commonwealth countries at least as a guideline when dealing with the admissibility of a victim's history in homicide cases. On the other hand I would not think that the absence of an overt act should always preclude an accused introducing evidence as to the dangerous character of the victim of a crime, the judge should be able to use his discretion in some circumstances. The question of whether a particular hostile demonstration was of such a nature as to place the defendant in a reasonable fear of immediate death or bodily injury is one which must be determined by the jury. Thus the inquiry is directed to the situation as it appeared to the defendant at the time of the killing. Evidence of prior threats by the deceased which are known to the defendant or

evidence of his bad character, is important only in determining the reasonableness of the accused's belief that the defensive measures were necessary.

The admissibility of evidence of the victim's dangerous character to show that he was the aggressor is but one instance of the broader question concerning the use of character evidence to prove conduct. Although an individual's character is logically relevant to show the probability of that person engaging in certain conduct, it is weak evidence and tends to be given improper weight. Thus circumstantial use of character evidence is generally not allowed, but under certain circumstances this rule of exclusion is relaxed. If the prerequisite overt act is shown, the accused is generally permitted to support his plea of self-defense by adducing evidence of the victim's dangerous character. Only relevant character trait of the victim may be shown; a victim's character for chastity is irrelevant in a case of homicide. It is well settled that where the accused has introduced evidence tending to show the victim's dangerous character, prosecution may rebut the evidence by showing the victim's peaceful character. However conflict has arisen as to the condition under which the state may offer such proof in rebuttal. By one view, it is allowed only when the accused directly opens the character-door by adducing evidence of bad character reputation for violence.[1] This has the advantage of permitting the accused to give evidence of self-defence and still keep out altogether this 'collateral' evidence of charac-

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1) People V. Hoffman (1925) 195 Cal. 295, 311, 232 P. 974, 980; Richardson V. State (1920) 123 Miss. 232, 85 So. 186.

ter, in keeping with the general tradition against using evidence of character to show conduct. It restricts the opportunity for the appeal to pity and vengeance implicit in the praise of the character of the deceased. It is, moreover in an attractive consonance with the rule as to the exclusive privilege of the accused to put his own character 'in issue'. On the other hand, when the crucial question as to who was the first attacker, on which the just decision of the murder charge may depend, is in doubt, the character of the dead man for peace or violence has a revealing significance which may well be thought to outweigh the possibility of prejudice, here so much less than in the case of an attack on the character of the accused. Accordingly, Wigmore[1] supported by some court decision,[2] has favoured the view that whenever the accused claims self defence and offers evidence that the deceased was the first aggressor, the state in rebuttal may produce evidence of the peaceful character of the deceased. Some other decisions reach like results by holding that in the particular case the threats or acts of aggression of deceased proved by the accused were such as to constitute an attack on his character for peacefulness.[3] But to draw a line between those acts of aggression sufficient to raise the issue of self-defense which are and those which are not attacks on character seems unrealistic.

Allowing character evidence to be introduced raises the further consideration of permissible method of proving character. There are as we know at least three logical methods of proof: it could be by testimony as to specific acts, or by testimony in the form of perso-

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1) 1 Wigmore, Evidence, § 63 at 471
2) Sweazy V. State (1937) 210 Ind. 674, 5 N.E. 2d 511; State V. Holbrook, (1920) 98 Ore. 43, 192 P. 640.
3) State V. Rutledge (1951) 243 Iowa 179, 47 N.W. 2d 251.

nal opinion and lastly it could be by testimony as to reputation. Although testimony of specific acts and personal opinions may better reveal the actual character of an individual, these types of proof are thought to involve a greater risk of undue prejudice, confusion of the issues, and comsumption of time.[1] In Scotland, though the accused may prove that a complainer was of a quarrelsome or violent disposition, he may not normally prove specific acts of violence commited by him. The court held in H.M. Advocate V. James Irving,[2] that it is competent for the panel to lead evidence of passionate diposition of the party assaulted, having given notice in his defences of his intention to do so; but he cannot prove specific acts of violence commited by him. In the case, the accused - James Irving - was charged with cutting and stabbing. The party on whom the assault was charged to have been commited was Theodore Blaikie, a blind fiddler. The panel pleaded not guilty, and the following defences were lodged for him: "The panel admits having inflicted a cut with a knife on Theodore Blaikie, as set forth in the indictments, but avers that he did so in order that he might liberate himself from the grasp of the said Theodore Blaikie, by which he was in danger of being strangled. The panel farther avers that the said Theodore Blaikie is of a fierce and violent disposition, or at least that he is subject to strong gusts of passion; and the panel offers to prove by competent evidence, that on various occasions, and while under their influence, he endeavoured to strangle various persons, and was preve-

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1) C. McCormick, Evidence, § 186 at 443 (Cleary ed. 1972); Cf 1 Wigmore § 198 at 676-77 Wigmore argued that the considerations which exclude specific acts to show the defendant's character were of little or no force when the defendant sought to prove the victim's dangerous character. He favoured admitting such evidence subject to the trial court' discretion to control the number of incidents.

2) (1838) 2 Swin. 109; Fletcher (1846) Ark. 171.

nted from doing so only by the forcible interference of third parties". On the defences being read, the Lord Justice Clerk observed that proof of individual acts of violence by Blaikie was certainly incompetent and clearly inadmissible; but he would allow it to be proved that he was a passionate man. Thus the prosecutor is only entitled to put a general question as to the peaceable disposition of the injured person and ask whether the victim was quarrelsome or inoffensive.[1] It is however, clear that in Scotland, the judge has a discretion to allow proof of specific acts of violence, if such question would be in the interest of justice as in the case of H.M. Advocate V. Kay.[2] In this case, Kay was charged on indictment with the murder of her husband. In the course of the trial which took place before Lord Wheatley and a jury counsel for the panel sought leave of the court to lodge out of time certain hospital records dealing with injuries suffered by the accused which resulted from specific assaults by her deceased husband. The advocate-depute did not object to the lodging of the productions but directed the attention of the court to Macdonald on Criminal Law,[3] where the learned author states:- "The accused may, on notice, prove that the injured party was quarrelsome, but he may not prove acts of violence committed by him". Reference was also made to Fletcher,[4] where the rubric states:- "It is not competent for a panel accused of culpable homicide to lead evidence of specific acts of violence alleged to have been committed by the deceased upon the panel some time previously". Counsel for the panel argued that the case of Fletcher

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1) Robt. Porteous (1841) Bell's Notes 293; Blair (1836) Bell's Notes 294
2) (1970) S.L.T. (Notes) 66, See also H.M. Advocate V. Cunningham High Crt. Glasgow; Glasgow Herald 14 Feb, 1974.
3) at P. 309
4) Arkley's Justiciary Reports (1846 - 1848) p. 171.

could be distinguished since (1) the indictment referred to malice "previously evinced" by the panel; and (2) the special defence alleged that she was acting in self-defence "reasonably believing that there was imminent danger to her life due to an assault intended by the deceased, David John Kay". He contended that the defence could not lead evidence of a general propensity to violence on the part of the deceased, particularly having regard to the statement in the special defence that the panel reasonably believed that she was in imminent danger of her life, unless she was allowed to establish that she had been assaulted with a knife by him before. Only by adducing such evidence could she establish her reasonable belief that violence would be inflicted upon her. In allowing the hospital records to be lodged and evidence of specific previous assaults by the deceased upon the panel to be tendered Lord Wheatley said:- "While the law as set forth in Macdonald's Criminal Law,[1] and the case of Fletcher,[2] which is cited in support of the proposition therein stated, is understandable in the normal case - since normally it would be undesirable to allow evidence on collateral matters in a criminal trial - in the circumstances of this case, I am of the opinion that the evidence in relation to these five assaults, if it is tendered, should be allowed. The reason for my decision is that the indictment narrates that the accused evinced malice and ill-will against the deceased on previous occasions. The defence which has been lodged as a special defence is to the effect that the accused was acting in self-defence, she reasonably believing that there was imminent danger

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1) at p. 309
2) Arkley's Justiciary Reports (1846 - 1848) at p. 171

to her life due to an assault intended by the deceased. I consider that it would be unfair to allow detailed evidence by the Crown in support of that part of the indictment which alleges that the accused had previously evinced malice and ill-will towards the deceased, without allowing the accused the opportunity of proving in turn by detailed evidence that she had reason to apprehend danger from the deceased. It seems to me that in the circumstances of this case equity demands that such evidence should be allowed. In reaching this decision, I wish to make it clear that I am not seeking to establish any new rule of law. It may well be that normally the general rule referred to by Macdonald would have to be given effect to, but if special circumstances be shown, and justice demands a departure from that rule then, of course, such a departure requires to be made. Each case will be dependent on its own circumstances. I am of opinion that the circumstances of this case as explained to me both by the learned advocate-depute and by learned counsel for the accused entitle me to regard this as an exception justifying a departure from the general rule". I think this is a good and fair decision, and it shows that judges should use their discretion where necessary and not always feel bound by the shackles of a chain which they themselves locked and can unlock. Evidence of specific acts of violence by the victim, it should however be made clear is usually excluded being an attempt to prove character by particular acts and that is even acknowledged in the above decision.

The relevance of prior threats by the victim against the defendant is closely associated with the use of the victim's dangerous character to show who was the aggressor. Generally, when the defendant in a homicide case claims he acted in self-defence, evidence of the character and background of the victim may be relevant for two distinct issues: first, who was the aggressor in the encounter, and second, whether the defendant's apprehension of grevious bodily harm was reasonable. In determining the admissibility of the tendered evidence, the probative value of the evidence must be evaluated in light of the purpose for which it is offered. When character evidence and prior threats are offered for the limited purpose of showing the probability of the victim's actions, prior knowledge by the defendant is immaterial as "(t)he inquiry is one of objective occurrence, not of subjective belief".[1] On the other hand, where the evidence is directed toward showing the state of mind of the defendant as to what he reasonably apprehended, his prior knowledge as to the information involved may be all important. The victim's expressed declaration of intention tends to show that such intention was in fact carried out; the threats are admissible under the "declarations of mental state" exception to the rule excluding hearsay.[2]

Evidence of the character and background of the victim as earlier indicated is relevant to show the reasonableness of the accussed's apprehension of serious bodily harm. When the accused pleads self-defence, his state of mind at the time of the offence becomes a material issue. It is undoubted that a homicide is excusable when

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1) 1 Wigmore, Evidence, § 63 at 471
2) McCormick, Evidence (Cleary ed. 1972) § 295 at 697 - 701

committed in self-defence by one who reasonably belives that he is in imminent danger of losing his life or receiving great bodily harm and that the killing is necessary to save himself. Since an act by one known to be a violent person may justify a more prompt and decisive response, circumstances known to the defendant at the time of the affray are relevant to show the reasonableness of his belief of imminent danger. In contrast to showing the probability of the victim's aggression, it is the reputed character of the victim, irrespective of his actual character, that is relevant to show the defendant's state of mind. Similarly, whether or not the threats attributed to the victim were actually made is, for this purpose, irrelevant if the defendant is shown to have believed that they were uttered.[1] If the threats were actually made, however, they are additonally relevant to show the probability of the victim's aggression. The other problem one is confronted with here, is the issue of whether evidence of the victim's prior conduct against third persons is admissible in support of a plea of self-defence. One could approach the question of its admissibility by examining the two distinct purposes for which evidence of the victim's character and background may be admissible. As stated above, when self-defence is pleaded, evidence as to the character and prior conduct of the defendant may be relevant on either of the two issues: (1) state of mind of the defendant as to his reasonable apprehension or (2) ascertaining whether the defendant or the victim was the aggressor. It has

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1) 2 Wigmore, Evidence, § 247

been argued in America that since the jurisprudence recognises that the accused's apprehension may be affected by his knowledge of the victim's dangerous reputation and prior threats and acts against the accused, the exclusion of violent acts against third persons of which the accused had knowledge would be logically and constitutionally[1] questionable. Knowledge that a person has acted violently in the past may have an even greater bearing on the accused's belief of danger than his knowledge of the victim's reputation. It is widely thought that the victim's prior threats against other persons, if known to the accused, similarly may be admissible. It is arguable that by admitting such evidence for the limited purpose of showing the accused's state of mind, the traditional rule against proof of character by particular incidents is not disturbed.

Lastly, it should be mentioned that the state can offer the deceased's peaceable character when the issue of self-defence has been raised, even though the accused has not first introduced the deceased violent character; however most courts thus far seem reluctant to accept this dictate of logic and fairness. A similar problem may arise where the homicide is said to have been provoked by some other immoral acts of the deceased, as it was in the case of Gregory V. State.[2] This was a case involving murder; the state alleged that the motive was a quarrel over rents but the accused alleged that it was his discovery of the deceased in intended adultery with his wife. After evidence of the latter fact, the state was not allowed to show the deceased's good reputed character for chastity or virtue, holding

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1) The exclusion of this evidence may be denial of due process since the accused is entitled to fair opportunity to present his defense. Cf Davis V. Alaska, 415 U.S. 308 (1974); Chambers V. Mississippi, 410 U.S. 284 (1973)
2) (1906) 50 Tex. Cr. 73, 94 S.W. 1041

that such evidence was admissible only if the defendant had offered the deceased's reputed bad character for chastity. Criticizing the decision Wigmore[1], said: "of such a rule, all that can be said is that it would be regarded as perverse, in any other community; apparently, the innocent dead are to receive no right to defend themselves in this court".

In the same way as character of the victim may be received in homicide cases, under certain circumstances, character may equally well be received if some act is involved upon the probability of which a moral trait can throw light. On this principle it has been allowed to evidence the illegitimacy of one claiming an inheritance;[2] and the ill-fame of a child's mother has been received on question of legitimacy, as in Pendrell V. Pendrell,[3] where on an issue to try heirship, the defendant was allowed "to prove the mother to be a woman of ill-fame", as tending to show the plaintiff a bastard.

In divorce cases, the moral character of the co-respondent or other person with whom adultery is charged is relevant.[4] For example, in Com. V. Gray[5] on a charge of adultery against a husband, after showing suspicious association with a woman, the court held that the character of the woman as a prostitute or the contrary may be shown. In Blackman V. State,[6] on a charge of adultery with a woman M, the reputation of M. for unchastity was admitted as corroborative evidence. However, the position in Scotland seems to be rather different, this is because in Scotland, the pursuer may not found on

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1) 1 Wigmore Evidence § 63
2) Legge V. Edmunds (1856)26 L.J. ch. 125, 135
3) (1732) 2 Str. 924; See also Kennington V. Catoe (1904) 68 S.C. 370, 47 S.E. 719.
4) Astley V. Astley, 1 Hag. Ecc. 714; Buchart V. Buchart, The Times, March 24, 1899; Von Eckhardstein V. Von Eckhardstein, The Times July 5, 1907
5) (1880) 129 Mass. 476
6) (1860) 36, Ala. 295, 297

the paramours sexual misconduct with persons other than the defender.[1]

In affiliation proceedings, evidence may be given by the defendant that other men had intercourse with the complainant, provided it was at a time which would affect the paternity,[2] otherwise, the question is only admissible in cross-examination and her denials cannot be contradicted.[3]

By the same token, where A sued an insurance company for loss sustained by a burglary, to which the defence was that the loss was caused by the dishonesty of B, A's servant, evidence was recevied that B was an associate of burglars and had entered A's service by means of a forged character.[4]

Another important area with regard to the discussion of character of third parties - complainants - is the consideration of the character of the alleged rape victim. Problems in this area are especially challenging when they concern the prior sexual history of the victim in a sexual assault case. The most crucial question is that, to what extent, if at all, should the accused be permitted to inquire into the prior sexual history and reputation of the alleged victim. This very delicate and serious issue has engendered much discussion and legislation, especially recently. Let's consider an example of a case in which the problem would be presented; assume that a man and a woman in a bedroom are suprised by the police in a most embarrassing situation. Assume further that the woman on seeing the police, cries "rape". Assume that accused's defence is that the woman had consen-

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1) King V. King (1842) 4 D. 590; Johnston V. Johnston (1903) 5 F. 659; Duff V. Duff, (1969) SLT (Notes) 53. Such evidence was, however admitted in Stirling V. Stirling, (1909) 1 SLT 288
2) Garbutt V. Simpson (1863) 32 L.J.M.C. 186; Fall V. Overseers, (1811) 3 Munf. 495, 497, 502.
3) See Ibid, see also R V. Gibbons (1862) 31 L.J.M.C. 98
4) Hurst V. Evans (1917) 1 K.B. 352.

ted to sexual intercourse for stipulated pre-paid fee. At an ensuing trial for rape, is the accused to be precluded from adducing testimony that the woman was widely reputed in the community to be a prostitute, that the premises involved had been used regularly during the prior months by the 'victim' as a house of prostitution, and that several other designated men had had similar relations with the 'victim' during the prior week? - Here are some of the issues that would have to be examined. From the questions raised in the hypothetical situation above, it is no surprise that of all aspects of laws relating to the crime of rape, it is the issue of admission of sexual history evidence that has sparked off the most controversy and criticism.[1]

Much has been written about the many problems which rape victims face in prosecuting their charges. The debate has involved champions of 'victim's rights' on the one hand and 'civil libertarians' on the other, and views range from that which holds admission of any sexual history evidence of the victim to be misguided and as a policy issue necessarily to be excluded from the trial, and that contending current limitations upon admission of sexual history evidence should be done away with, rules being expanded to allow all manner of inquiry into a victim's past sexual encounters. No doubt it seems impossible to resolve the controversy to the satisfaction of all. It will be worthwhile to examine some of the thought provoking arguments put forward by both sides. The champions of 'victim's rights' contend

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1) See e.g. Berger, "'Man's Trial, Woman's Tribulation': Rape Cases in the Courtroom" (1977) 77 Columb. Law Rev. 1.

that current rules and procedure must be changed, so that the rape victim is not in their words 'twice traumatised' - once during the crime, once during the trial. It has been said that: "(m)ost judges, lawyers and those experienced in the trial of rape cases would tell a female member of thier household if she were raped that it would be much better not to complain about it because to the victim the trauma of a rape trial can be often more serious than the original assault".[1] This it is argued is because the victim has often been portrayed as being on trial herself, at the mercy of a highly prejudiced jury, and suffering from a double trauma, all for the sake of bringing a rape charge which statistically results in acquittal in most cases.[2] Instances have been dramatised when a rape victim during her cross-examination had to cry out of frustration and in anguish and desperation - I'm not guilty! which explains the sentiments expressed by an editorial in the Toronto Globe and Mail of the 25th June, 1974 entitled 'The Second Ordeal for Victims of Rape'; it described the predicament of a rape victim as follows: "In a rape trial it is often difficult to tell who is on trial, the victim or the accused rapist. That's something every woman has to think about before she calls the police, because if the case comes to trial she will be under the most brutal kind of cross-examination about past affairs, about her sexual habits and preferences and about what she was thinking and feeling as she was being raped. This kind of questioning is permitted by the law as a means to determine whether she consented in any way to the encounter or whether she in fact invited

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1) "The Character of the Rape Victim", (1975) Chitty's Law Journal vol. 23 No. 2 at p. 57
2) See Bohmer & Blumberg, 'Twice Traumatized: The Rape Victim and the Court', (1975) 58 Judicature 391; see also Comment, Rape and Rape Laws: Sexism in Society and Law (1973) 61 Cal. L. Rev. 919.

it through provocative conduct. It has always been puzzling why a victim of rape is not entitled to the same protection as a person accused of a crime. For instance, if a man is charged with robbing a bank, it usually may not be mentioned during the trial that he has robbed banks in the past, for the simple reason that previous robberies do not have a bearing on whether he did, infact, rob the bank in question. When it comes to rape, a woman can be asked how often she goes to bed with men and whether she ever does it for money. It's degrading and it's unnecessary in determining guilt or innocence. Surely we are past the stage of thinking that if a woman is no longer a virgin, she is no longer chaste; that if she has known men before that there is a good chance she invited the assault, or, at least was prepared to co-operate".[1] This aptly shows the problems faced by a rape victim and it also highlights some important arguments which would be considered shortly. May I just say that most of the things said if not all, are as true of the Canadian and American Courts as they are of the commonwealth countries. In recognition of the problems faced by rape victims who testify as prosecution witnesses at trials in which evidence of their sexaul histories may be introduced, many of the countries have enacted "rape shield statutes".[2] These laws shield complaining witnesses from invasions of their sexual privacy by prohibiting the admission of irrelevant evidence of prior sexual conduct and reputation for chastity at trial. The legislative protection of rape victims has been deemed necessary because - as

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1) See at 'The Character of the Rape Victim' - (1975) Chitty's Law Journal at p. 57.
2) See e.g. Sexual Offences (Amendment) Act 1976 (U.K.); New South Wales Depart. of Att. Gen and of Justice Criminal Law Rev. Division Rept, on Rape and Various other Sexual Offences (1977).

already indicated - of the abuse and humiliation frequently suffered by them at the hands of police, judges and defence lawyers.

On the other hand however, 'civil libertarians' have argued the case for the accused fervently and with equal vigour, contending that limitations upon interrogation of the chief witness for the prosecution would serve to abrogate the right to a fair trial, thereby encroaching upon the accused's inalienable rights. It has also been criticised as expunging logically relevant evidence. But the opposing argument is that it is legitimate for the state to take a policy stand on the question, in order to rectify what is seen as an extreme lack of justice resulting from the current judicial process. In addressing the problem in relation to the Michigan Law[1] for instance, it was remarked: "It has been argued that the evidentiary limitations provided for in the new law (i.e., total exclusion of any testimony of prior sexual relations between the victim and third parties) abridge the defendant's constitutional right to due process and to confrontation. Admitting such evidence may be logically relevant (i.e., that the existence of A makes it more likely that B has occured), the legislature has, in the new law, determined that this testimony is not legally relevant. Courts have in numerous circumstances, where overriding policy considerations were at stake, totally excluded evidence which may be logically relevant but which is held as a matter of law not to be legally relevant".[2]

At common law an individual accused of a crime has a right, as a general rule, to confrontation with witnesses upon whose evidence the

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1) See Scutt, "Reforming the law of Rape; The Michigan Example" (1976) 50 A.L.J. 615
2) See "Michigan's Criminal Sexual Assault Law" (1974) 8 Uni. Mich. Jrn. Law Ref. 217 at 229

proseuction relies to obtain a committal, and, later a conviction[1]. In the United States of America, this right has been embodied in the Sixth Amendment to the Constitution providing that[2]: "(I)n all criminal prosecutions, the accused shall enjoy the right .... to be confronted with the witnesses against him ....." Just as confrontation of witnesses is provided for in other crimes, in rape those witnesses whose evidence forms the foundation of the case for the prosecution are required to appear; thus the complainant is not excused. No suggestion has been made in the rape case that due to the adverse pressures attendant upon the appearance of the victim as complainant in a rape trial, she should be generally exempt from presenting herself. Such a move would very probably meet with little or no acclaim, being directly in conflict with principles of fairness and the rights of accused persons to confront witnesses. However, a sympathetic view has been put that complainants other than those in the rape case: "..... can go to court to seek redress for their victimisation without incurring (a) painful, prejudicial attack on his or her private life and intimate conduct ... Rape targets on the other hand, are disproportionately discouraged from prosecuting their violaters .... Those victims who do invoke the legal process, paying the price in personal exposure, often find that their sacrifice has netted them absolutely nothing: the jury acquits the man of rape but convicts the woman of loose behaviour".[3] Furthermore, it is accepted that policy reasons exist in some crime-situations that support the

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1) Halsbury's Laws of England, vol 17 (4th ed.) 1976) § 231
2) See Westen "The Compulsory Process Clause" (1974) 73 Mich. Law Rev. 73 at 73 - 74
3) Berger, "Man's Trial, Woman's Tribulation"..... (1977) 77 Columb. Law Rev. at p. 45

failure to disclose the identity of a person giving the primary information that ultimately leads to arrest and prosecution of an individual. For example, where a case is built on information given to police by a criminal-informer, the identity of the informer will not be disclosed. The informer will not be confronted by the accused.[1] But it has been contended that 'compelling reasons of justice' will always be present to require personal appearance of the victim of an alleged rape.

It is at the stage where the complainant comes to be examined during the rape trial that a very real divergence between the application of rules of admissibility and relevance in 'ordinary' trials and trials where the crime charged is rape is observable. It has been seen that sometimes it is 'relevance' that is questionable;[2] sometimes it is the 'guidelines' from common law which are questionable[3] or as it sometimes happen are applied unthinkingly by judges;[4] also sometimes information which would appear to do more to inflame the jury or to confuse them rather than enlighten them[5] is allowed into the forum. I think it is important to point out that a jury is just a body of reasonable people like an average human being; defence lawyers know this and realise that if they can demean the victim they increase their client's chances of acquittal, and they certainly spare no time in so doing. Under the guise of enquiring into consent they engage in character assasination which can be absolutely devastating to the female, and in many cases the range of these questions is only limited by the ingenuity of the counsel and the interference

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1) See Rogers V. Lewes Justices; Ex parte Home Sec. (1973) A.C. 389 Duncan V. Cammell-Laird (1942) A.C. 624
2) R V. Clay (1851) 5 Cox C.C. 146
3) See e.g. R V. Clay, Ibid, and per Wells J. in R V. Gun; Ex parte Stephenson (1979) 17 S.A.S.R. 165 at 179.
4) R V. Clay (1851) 5 Cox C.C. 146
5) See Wilson, 'Victims of Rape: The Social Context of Degradation' (1976) 9 A.N. Z Jrn. Criminol. 249; and H. Kalvan & H. Zeisel, The American Jury (1966) at p.259

of the judge. A whole series of examples can be cited of especially humiliating and embarrassing sequence of irrelevant cross-examination questions,[1] like asking if the woman were on the pill; or if she ever had an illegitimate child; or ever had an abortion; or ever smoked marijuana or took drugs; or and infact frequently asked how old she was when she first had sexual intercourse. In most cases, these set of questionings merely prejudice and bias the minds of the jury against the raped and in fact has nothing to do with consent which is the cross of the matter, and it is no exaggeration, as would soon be demonstrated, to say that it is not unusual for the counsel of the accused to get away with such questioning and what more, actually succeeding in his quest.

It is interesting though not surprising to note that evidence of a complainant's sexual conduct and reputation for chastity will normally be irrelevant, both for substantive and impeachment purposes, to the issues considered at rape trials. In California V. Blackburn,[2] the court stated:- "The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best". In Dickie V. H.M. Advocate,[3] Lord Adam reiterated the same view when he said: "There is no doubt that it is not a relevant defence to a charge of rape, that the person alleged to be injured was unchaste, however bad her character may be in that respect. ... But cases, such as this, are

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1) See B. Babcock - Sex Discrimination And The Law (1975) at 833; see also 'The Victim in a Forcible Rape Case: A Feminist View' 11 Am. Crim.L.Rev. 335 (1973)
2) (1978) 56 Cal. App.3d 685, 128 Cal. Rtpr. 864
3) (1897) 2 Adam 331 at 338

exceptional in this respect, that although unchastity is not a relevant defence to the charge, yet nevertheless it is competent, upon due notice given to the Prosecutor, to lead evidence to impeach the chastity of the person alleged to be injured. The difficulty is to determine the limits within which such evidence must be confined"; and we shall endeavour to define the confinement later in the discussion.

In Scotland, it has been often held by the courts that in cases of rape or of similar assaults upon woman the accused may attack character for chastity, and may lead evidence that at the time she was reputedly of bad character.[1] The Lord Justice Clerk observed as follows in Dickie V. H.M. Advocate[2] "The right to attack the character of a witness, and to bring evidence in support of the attack, is one which has always been carefully kept within very limited bounds. .... Accordingly, in the ordinary case, while it is competent to ask a witness whether he has been convicted of a crime, the fact cannot be vouched except by an extract conviction, it is not competent to enter upon an enquiry into his general antecedents, and to try to prove that he has committed a crime. It is only competent to inquire into matters directly connected with the subject of the trial then proceeding. In the case of injuries to women, some specialities have been introduced for obvious reasons. Where a woman maintains that she has been indecently attacked, it is competent, upon notice being given, to attack her character for chastity, and to put question to her involving the accusation of unchastity". The message in England

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1) See Dickie V. H.M. Advocate, (1897) 2 Adam 331; H.M. Advocate V. Reid and ors. (1861) 4 Irv. 124; H.M. Advocate V. David Allan (1842) 1 Brown 500 at 504 per Lord Moncrieff
2) (1897) 2 Adam 331 at 336

is the same as one could gather from the decided cases. A good example is the case of R V. Greatbanks,[1] where G was indicted with rape. The defence was that the prosecutrix had consented to the act of sexual intercourse. The prosecutrix denied consent and the question arose whether witnesses could be called by the defence to show that the prosecutrix was a woman of notoriously bad character for want of chastity or common decency. Counsel for the defendant submitted that such evidence was admissible and cited authorities[2] in support. In its decision the court held the view that the evidence was admissible, though it went on to remind us that in a case other than rape, such evidence would clearly not be admissible; in rape cases however, special rules apply. It was also pointed out that certainly evidence of intercoursse with named men could not be admissible in a rape case, but evidence showing that the woman was a prostitute or as in this cae, that she was a woman of loose character or notorious for want of chastity or indecency was, on the authorities, admissible. In the earlier case of R V. Thomas Tissington,[3] the court had made a similar declaration when it held that on a trial for rape, witnesses may be called on the prisoner's behalf to prove general indecency of the prosecutrix and witnesses for the prosecution may then be called to rebut their testimony. However, the decision in this case was only delivered after the presiding judge had expressed some doubts and hesitation. The prisoner(T) was indicted for a rape upon a child between the age of ten and twelve years of age. The counsel for the prisoner, cross-examined the witnesses

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1) (1959) Crim. L.R. 450 (C.C.A.)
2) See R V. Clarke (1817) 2 Stark. 241; R V. Tissington 1 Cox 84
3) 1 Cox. 84

for the prosecution as to particular facts of indecency on the part of the prosecutrix, and of solicitation by her previously made to men to have connection with her. For the prisoner, witnesses were called to prove these facts, but Abinger C.B., objected to their being examined, referring to a case upon the Northern Circuit, but not naming it, before Wood, B., in which he was counsel, where such a course was disallowed, and where witnesses for the prosecution were not permitted even to be cross-examined as to such facts. However Abinger, C.B., later assented, on Clarke's[1] case being cited; he allowed witnesses to be called to prove general want of decency in the prosecutrix, and then permitted the prosecutrix to call witnesses to rebut their evidence.

The interesting issue here, in studying the state of 'relevance' of evidence pertaining to sexual history of the complainant is that as a factual matter courts have concentrated upon the consent of the woman as being indicated by her previous sexual experience, rather than considering that question from the viewpoint of the mind of the accused. The concentration upon the reputation of the complainant, almost as if she were the one whose guilt or innocence were to be determined, is an indication of the bias against the rape victim in the current system. Also rather than considering that as a 'fact' the woman must - or is likely to - have consented to the act, it would be more in concert with fairplay to say in such a case that evidence of the prior sexual conduct of the complainant may be

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1) (1817) 2 Stark.241

extremely relevant to a defence of consent or a reasonable belief of consent.

Lack of consent on the part of the victim is an essential element of these crimes, except in cases of sexual offences committed upon minors. In the latter cases, express statutory language provides that lack of knowledge of the victim's age shall not be a defence; thus, not only will evidence of a reasonable belief of consent be irrelevant, but also evidence of actual consent is irrelevant. However, in other cases of rape which require proof of lack of consent of the victim, the reasonableness of the defendant's belief of consent should be probative of the complainant's actual consent to the conduct in issue, since consent is an issue of fact. It has also been suggested that it would be in concert with general standards of criminal law for the courts to admit prior sexual activity and knowledge of the woman's past experience that the accused possessed at the time of the alleged crime as indicating that the accused may have honestly believed the woman to be consenting, whether or not she was consenting in reality.

At anyrate, the basis upon which the courts admit evidence in rape cases is patently clear; as authorities abound to indicate that the general assumption is that an unchaste woman is more likely to consent,[1] and it is generally not infrequent for the courts to disregard the actual state of mind of the complainant as it were at the time of the particular instance charged. In the American case of People V. Johnson,[2] Garoutte, J., said that: "It is certainly more

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1) See People V. Collins (1962) 186 N.E. (2d) 30; People V. Abbot 19 Wend. 192 (N.Y. 1838) R V. Clarke (1817) 2 Stark 241; R V. Barker (1829) 3 C & P 589; Keramat V. R, 42 C.L.J. 524
2) (1895) 106 Cal. 289

probable that a woman who has done these things ... in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed". In another American case of State V. Johnson,[1] Isham, J., said: "In all cases of this character, the assent of the witness to the act is the material matter in issue, and on that question the defence generally rests on circumstantial testimony. In determining that question, which is purely a mental act, it is important to ascertain whether her consent would from her previous habits be the natural result of her mind, or whether it would be inconsistent with her previous life and repugnant to all her moral feelings. Such habits as are imputed to the witness by this inquiry have a tendency to show such a consent as the natural operation of her propensities, and rebut the inference or necessity of actual violence".

With regards to the issue of consent of the rape victim, it is obvious that English courts favour the American line of thought, as evidenced in a number of the authorities.[2] However, it is interesting to note that Scotland does not share the view; In Dickie V. H.M. Advocate,[3] the Lord Justice Clerk criticised the assumption by saying: ".... it seems a relevant subject of enquiry whether the woman was at the time a person of reputed bad moral character, as bearing upon her credibility when alleging that she has been subjected to criminal violence by one desiring to have intercourse with her. Such evidence may seriously affect the inferences to be drawn

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1) (1856) 28 Vt. 514
2) R V. Tissington 1 Cox 84; R V. Gibbons 31 L.J.M.C. 98; R V. Clarke (1817) 2 Stark 241
3) (1897) 2 Adam 331

from her conduct at the time. (But) .... I am not aware that .... a female who yields her person to one man will presumably do so to any man - a proposition which is quite untenable. A woman may not be virtuous, but it would be a most unwarrantable assumption that she could not therefore resist, and resist to the uttermost, an attempt to have connexion with her by any man who might choose to endeavour to obtain possession of her person, and to whom she might have no intention to yield. Every woman is entitled to protection from attack upon her person. Even a prostitute may be held to be ravished if the proof establishes a rape although she may admit that she is a prostitute". This tallies with the observation made by Ordover[1] that: "(T)he traditiional rule (i.e., that an unchaste character trait is predictive of present consent) is wrong. It proceeds from a faulty premise (i.e. that all non-marital intercourse is abnormal, immoral, reprehensible and uncondoned by contemporary society) and contravenes principles and policies long embodied in the law of evidence". May I just say that such antiquated victorian concept bears no relation to the reality of today, or will in some future generation be so esteemed. Berger,[2] also hold the view that the use of general reputation evidence to show a propensity for a particular type of activity maybe criticised in the context of the rape trial. Berger pointed out that two exceptions to the usual rules of evidence apply in this regard:[3] "When the accused in a homicide prosecution claims that he acted in self-defence, he may show the victim's character for violence. The latter exception to the usual ban on this

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1) 'Admissibility of Patterns of Similar Sexual Conduct: The Unlamentable Death of Character for Chastity (1977) 63 Cornell L. Rev. 90, at 97.
2) (1977) 77 Columb. Law Rev. at p. 19
3) See Ibid

kind of proof - and its close analogy, the use of the complainant's sexual history to evince consent - are somewhat less fraught with danger than introduction of the character of the person charged, which might prejudice the trier of fact so as to lead to an unjust conviction... However, as between the two exceptions in homicide and rape, the latter seems less justifiable since the putative victim is alive and a witness and subject to cross-examination in cases where the defence is consent. Thus, the accused will ordinarily have little need to rely on the fairly dubious inference from the character to present conduct (which, in any event, is probably weaker in a sexual context than on the issue of aggressive tendencies). If the defendant in a prosecution for theft were to claim that the complainant had made him a gift, it is most unlikely that the court would allow him to offer proof of the alleged donor's prior generosity to third parties ... The burden should fall on proponent's of the prevailing practice to show why a claim of consent in a prosecution for rape warrants different evidentiary treatment from that accorded similar issues in other settings".

In Scotland, the prosecutor may lead evidence that the victim was a good character;[1] he is entitled to put a general question as to the respectability of females alleged to have been abused,[2] even where no notice of attack has been given by the defence.[3] However it has been indicated that such questions should not be put before the complainer has given evidence. These principles are clearly stated in H.M.

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1) Dickson, Evidence (3rd ed.) at § 7; see also H.M. Advocate V. McMillan (1846) Ark. 209
2) Malcolm Maclean (1829) Bell's Notes 294; Robertson Edney (1833) Bell's Notes 293
3) Porteous (1841) Bell's Notes 293

Advocate V. John McMillan.[1] The accused, an upholsterer in Rothesey, was charged with the crime of rape, in so far as he had ravished a young woman of the name of Mary Paton. The panel pleaded not guilty. The first witness called was a person in whose service Mary Paton had been during the previous three years. Counsel for the prosecution, proposed to ask him if Mary Paton was a girl of good character. Counsel for the panel, objected to such a line of examination. He contended that it was unusual for the prosecution to offer evidence of the good character of a witness in such a case, unless special defences were lodged impeaching her good character. The panel was willing that this witness should have the full benefit of a general good character up to the time when he had connection with her, but the issue for the Jury to try was, whether or not this connection took place by violence or with consent - whether his or her story was correct - and they must judge of this by looking to the circumstances that occured at the time, and not the general character of the principal witness. In his judgement Lord Moncrieff[2] said: "I have no doubt whatever on the point. In any case of this kind, where the evidence so much depends upon the character of the woman, would it not be of great importance to the panel if witnesses could say, that she was of such a character as would make it likely that she yielded to his solicitations? On the other hand, is it not important for the prosecutor to show, that the woman was of such a character as would render that highly improbable?" Lord Wood said while concurring:[3] "I have no doubt whatever that the examination is perfectly competent".

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1) (1846) Ark. 209
2) Ibid at 211
3) Ibid

And sharing that view the Lord Justice-Clerk said:[1] "No one is more inclined than I am to allow the character of witnesses to be investigated by the panel; but, on the other hand, such evidence is equally competent to the crown". However, the Lord Justice-Clerk had earlier remarked that:[2] "It is a thing unknown to put such a question at the commencement of a trial, and before the principal witness has been examined".

Other factual situations arise which qualify as exceptions to the general rule, that a victim's sexual history is irrelevant; for instance, - (outside proving the victim's character for chastity or unchastity) - many courts and statutes in the different countries, recognise the relevance of past voluntary sexual relationships between the victim and the accused himself. Thus evidence that the victim has voluntarily engaged in sexual intercourse with the accused is deemed to have strong probative value in so far as it concerns the issue of her consent to the sex act in question. In Dickie V. H.M. Advocate,[3] the Lord Justice-Clerk in his judgement said that: "... it has been held competent for the accused to prove that the witness voluntarily yielded to his embraces a short time before the alleged criminal attack. That such proof should be allowed is only consistent with the clearest ground of justice, for, in considering the question whether an attempt at intercourse be criminal, and to what extent criminal, it is plainly a relevant matter of inquiry on what terms the parties were immediately before the time of the

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1) (1846) Ark. 209 at 211
2) Ibid at 20
3) (1897) 2 Adam 331 at 337; see also Walter Blair (1844) 2 Brown 167

alleged crime". In Rex V. Martin,[1] it was held by Williams, J., that, on the trial of an indictiment for rape, the prosecutrix may be asked whether previously to the commission of the alleged offence, the prisoner has not had intercourse with her by her own consent, on the ground of the relevancy of question.

When the rape victim is being cross-examined about her sexual relationship with the accused, whatever answers she gives may be contradicted by the accused as clearly pointed out in R V. Riley.[2] In this case, the accused, (James Riley), was tried upon an indictment charging him with an assault upon one Alice Cresswell with intent to commit a rape upon her; there were two other counts in the indictment, one charging an indecent assault, the other common assault. The defence raised by the prisoner's counsel was that whatever was done by the prisoner to the said Alice Cresswell was done with her consent. The said Alice Cresswell was at the time of the commission of the alleged offence by the prisoner a woman of or about thirty years of age. She was cross-examined by the counsel for the prisoner as to previous repeated voluntary acts of connection with the prisoner at specified times and places before the time of the commission of the alleged offence, which she denied, and swore that she never at any time or place had had connection with the prisoner. Counsel for the defence proposed to call several witnesses to prove these several alleged acts of connection between the prosecutrix and the prisoner, but the court refused to allow the said witnesses to be called or examined for the purpose of giving such

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1) 6 C.&P. 562; see also R V. Riley 16 Cox c.C. 195; (1887) 18 Q.B.D. 481
2) (1887) 18 Q.B.D. 481; see also R V. Holmes & Furness (1871) L.R. 1 C.C.R. 344

evidence, upon the ground that such evidence was not admissible for the prisoner upon the said indictment, and that the counsel for the prisoner was bound to take the answer of the prosecutrix for the purpose of that trial, but the court reserved for the opinion of the higher court the question as to whether they were right in so ruling. The prisoner was convicted on the first count of the said indictment, but the court respited judgement and admitted him to bail pending the decision of the higher court.

It appears that doubt had arisen from the use of the word 'probably' in art. 124 of Stephen's Digest of The Law of Evidence, where it is stated that a woman against whom an attempt to ravish has been committed may be asked whether she had connection on other occassions with prisoner, "and if she denies it she probably may be contradicted". It is undoubted that Lord Coleridge, C.J., was certain about the correct position when he said: "I am of opinion that this conviction must be quashed, on the ground that evidence material to the issue was rejected by the court. The indictment was for an assault commited by the prisoner upon a woman with intent to commit a rape upon her; and the questions and answers that were rejected were tendered for the following purposed; namely, that the woman having denied that she had had connection with the individual accused of assaulting her, it was sought ab aliunde to prove that at certain specific times and places before the time of the commission of the alleged offence, she had voluntarily had connection with the priso-

ner. It appears to me that such evidence was admissible. Now, it has been held over and over again that where evidence is denied by the prosecutrix with regard to acts of connection committed by her with persons other than the prisoner, she cannot be contradicted. ... but to reject evidence as to the particular person is another matter. Because not only does it render it more likely that she would or would not have consented, but it is evidence which goes to the very point in issue. Take the case of a woman having lived without marriage for two or three years with a man before the assault; could it be contended that, had she denied it, proof of that sort was not material to the issue; and if material to the issue, that if denied evidence to contradict it could not be given". I must say that I agree with this judgement not only on ground of authority but also of good sense. But it seems that the counsel for the defence cannot go further, and prove specific immoral acts with the prisoner, unless he has first given the prosecutrix an opportunity of denying or explaining them.[1] There is however, an inverse relationship between the remoteness in time of voluntary consent previously given by the victim and its relevancy to the present issue of consent. In other words, the more distant in time the earlier consent was given, the less likely it is that the consent continued to exist at the time of the act in question. Thus, under ordinary circumstances, the fact that the victim once had a sexual relationship with the accused in the remote past has very little relevance to the issue of whether a current voluntary relationship existed.

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1) R V. Cockcroft 11 Cox. c.C. 410; see also R V. Martin 6 C.&P. 562

On the other hand, although the prosecutrix may be cross-examined as to particular acts of immorality with other men, she may decline to answer such questions, while if she answers them in the negative, witnesses cannot be called to contradict her.[1] For instance, in R V. Cockcroft,[2] where the accused was charged with having committed a rape on one Mary Jackson. The defence counsel asked the prosecutrix whether she ever had connection before with other men; she declined to answer. Willes, J., interjected to point out that "the prosecutrix need not answer the question unless she likes". The defence then proposed to call witnesses to prove particular acts of connection with the prosecutrix and other men, and cited R V. Robins,[3] to support this move. Willes, J., in his judgement said: "You may cross-examine the prosecutrix with respect to particular acts of connection with other men, but if she denies them you are bound by her answer. You may not call those men to contradict her; you may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them you may call witnesses to contradict her". This decision effectively overruled R V. Robins[3] a case which is a direct authority in favour of the admission of the evidence. In that case the prosecutrix denied having had connection with a man named. Coleridge, J., after consulting with Erskine, J., said that neither he nor that learned judge had any doubt on the question, and that it was not immaterial to the question whether the prosecutrix had had this connection

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1) Stokes V. R (1960) 105 C.L.R. 279; R V. Cargill (1913) 2 K.B. 271; R V. Thompson (1951) S.A.S.R. 135
2) 11 Cox C.C. 410
3) (1843) 2 M. & Rob. 512

against her consent to show that she had permitted other men to have connection with her, which, on her cross-examination, she had denied. Martin, B., in a later trial of R V. Cockcroft, commented on R V. Robins when it was raised again before him by the defence counsel that he considered the decision in the case wrong, and so would not allow witnesses to be called to prove particular acts of connection between the prosecutrix and other men. His judgement therefore, agrees with that of Willes, J., in the same case. Another case that reinforces the line taken by R V. Cockcroft[1] is R V. Hodgson[2], which is a decision that the prosecutrix is not bound to answer the question whether she has not had connection with another man named, and that evidence cannot be called to show that she had had such connection. R V. Holmes and Furness,[3] is a very significant case in this respect. Holmes and Furness were tried upon an indictment charging them with indecently assaulting one Sarah Palmer. The prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it. The prisoner's counsel called the said Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel for the prosecution objected on the authority of R V. Cockcroft, and the court refused to allow the question to be answered, but reserved the point whether such answer ought to have been allowed to be given, for the decision of the Court for Crown Cases Reserved. The jury found both prisoner's guilty, and the court sentenced them but respited the execution of the said sentences until

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1) 11 Cox. C.C. 410
2) Russ & Ry. 211 (1811)
3) 25 L.T. Rep. N.S. 669; 12 Cox C.C. 137; 1 c.C.R. 334

the decision of the Court for Consideration of Crown Cases Reserved should be known. Kelly, C. B., giving the decision of the court said:[1] "The question in this case is of very great importance, and if we had entertained a substantial doubt upon it, we should have desired the case to be re-argued before all the Judges: but looking to the principle of evidence and the authorities upon it, it seems impossible to entertain a serious doubt that the evidence tendered to contradict the prosecutrix was inadmissible. On the trial of an indictment for a rape, or an attempt to commit a rape, or for an indecent assault, which in effect may amount to an attempt to commit a rape, if the prosecutrix is asked whether she has not had connection with some other man named, and she denies it, we are clearly of opinion that that man cannot be called to contradict her. The general principle is that, when a witness is cross-examined as to a collateral fact, the answer must be taken for better or worse, and the witness cannot be contradicted as to that by a third person. If the proposed evidence were receivable, the prosecutrix might be cross-examined as to the whole history of her life, and one, ten, or even fifty persons might be called to contradict her on various points of the evidence, and she be totally unprepared to meet the evidence of contradiction of any one of them. On principle, therefore, I am of opinion that the party cross-examination on such collateral facts must be bound by the answers, otherwise it would lead to a multiplication of collaterall issues, and would be attended

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1) 12 Cox C.C. at 143

with great inconvenience and injustice to the prosecutrix".

Also in Scotland, the accused is not permitted to prove individual acts of unchastity on her part with other men. In H.M. Advocate V. David Allan,[1] the court held that the principal witness in a charge of rape or assault with intent to ravish, was not bound to answer the question whether on particular previous occassions she had had criminal intercourse with other men; and that it was incompetent for the panel to prove by the evidence of witnesses such criminal intercourse, although notice had been given in special defences that the proof was proposed. This matter also came up for discussion in H.M. Advocate V. James Reid and others.[2] In this case, James Reid, George Davidson and George McNeill were charged with rape, or assault with intent to ravish, commited on the person of one Agnes Edington. The panels pleaded not guilty, and they lodged special defences, in which besides a plea of alibi, 'they farther state, that Mrs Agnes Edington is a person of unchaste character and has had carnal connexion with men other than the person said in the indictment to be her husband'. The court directed the allegation of unchastity to be deleted as a special defence, and to be stated merely as a notice of the panels' intention to lead evidence of the unchastity of the woman said to have been ravished. Lord Neaves,[3] in his judgement gave his view as to the attempt by the defence to give evidence of specific acts of unchastity between the complainant and some other men, he said: "Here the enquiry is, whether these panels had forcible connexion with the witness. If in the trial of such a case, the woman may

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1) (1842) 1 Brown 500
2) (1861) 4 Irv. 124
3) Ibid at 128

be made to answer twenty different questions, as to whether on twenty different occasions she had connexion with as many different men, we might sit to the end of our lives investigating such cases. I conceive that such a course would be contrary to the principles of justice, and of judicial inquiry. In the present case, no specific notice has been given of such an enqiry, but even if there had, I should regard such an enquiry into the whole latent life of the witness as a cruel and grevious evil". The Lord Justice-Clerk in his own contribution started by asking:[1] "Is the panel in such a case to be allowed without notice or even with notice, to prove specific acts of unchastity ..... It is for the panels to show that at the time when the offence is said to have been committed, the woman was of loose and immoral character, not as matter of defence, but as bearing very materially on the effect of the evidence on the minds of the jury. The law has done wisely in making an exception in the case of rape from the general rule, that you cannot raise up a collateral issue, and allow a proof of a witness' character and repute. But to extend this to particular instances of unchaste conduct would be most unfair to the witness especially without very pointed and distinct notice, and even with such notice .... The proof attempted of particular circumstances and incidents in this woman's life, merely for the purpose of contradicting the statements made by her on cross-examination, seems to me to have no pertinency or relevancy at all. I hold it to be established law, that such proof is inadmissible, and the laws of all countries agree in disallowing it".

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1) (1861) 4 Irv. 124 at 129

It is necessary to highlight the opinion of the Lord Justice-Clerk in H.M. Advocate V. Walter Blair[1] on this matter. He said: "I may state, however, that after a careful consideration of the authorities, I would be prepared, if necessary, to admit proof of particular acts of carnal connection between the injured party and other men, as bearing most materially upon the guilt or innocence of the accused, in a charge of rape, provided special notice had been given to the public prosecutor, that such proof was proposed". I must say that this does not seem to be an isolated view, because in the earlier cited case of H.M. Advocate V. Reid and others,[2] Lord Ardmillan said: "Farther, as I understand from the prisoner's counsel, what he proposes to adduce is not a proof of prostitution, or even of reputed and notorious unchastity, but proof of particular acts of unchastity, or particular unchaste connection or relations as 'kept mistress' of a particular man, while in regard to the man, or the relation, no name, or date, or place, is specified in the defences. To allow this proof, without the most specific and distinct notice as to name, place, and date would, in my opinion be unjust to the witness, whom the court is bound to protect against an attack without notice". The last bit of the above passage by Lord Ardmillan appears to be a sort of tacit support for the view expressed in H.M. Advocate V. Blair[3] in that he seems to indicate that where adequate notice was given, he would give some consideration as to admitting or actually admit the evidence.

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1) (1844) 2 Brown 167 at 171
2) (1861) 4 Irv. 124 at 127
3) (1844) 2 Brown 167

However the position in Canada is clear enough; and one of the most recent exposition of the law in Canada is stated by Culliton, C.J., of Saskatchewan Court of Appeal on the 29th November 1974, he said: "... In the course of cross-examination of the prosecutrix, learned counsel for the appellant's said to the court: - 'My Lord I have a question I want to ask this witness pertaining to conversation she had with Dr. Fanner and the police. It has to do with the question of previous sexual intercourse'. - After discussion in which counsel for both the Crown and the appellant's participated, the learned trial judge said: - 'You can ask her if she had any previous acts of sexual intercourse with the accused .... and you can ask her as to the alleged acts of intercourse between her and men other than the accused. Now you have to name the men and if she denies it, that's it. I think that is as far as you can go'. - Then in the absence of the jury the learned trail judge instructed the complainant as follows: - 'I wish to indicate to you that before the jury is brought in that defence counsel may ask you in cross-examination if you have had sexual relations with people other than the accused. He may name somebody. I am telling you now that you can refuse to answer, but if you do answer, if you say 'Yes' or if you say 'No' then that's the end of it. He can't go behind that and ask you any more questions than that. Alright do you understand now?' - The law respecting the right to cross-examine the complainant in a rape case in respect to other acts of intercourse is in my opinion properly stated by Osler, J. A., in The King V. Finnessey,[1] as follows:- 'The prosecutrix may

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1) 10 C.C.C. 347 at 351

be asked questions to show that her general character of chastity is bad. She is bound to answer such questions and if she refuses to do so the fact may be shown.[1] So too she may be asked whether she has previously had connection with prisoner and if she denies it that may be shown.[2] Such evidence is relevant to the issue since in both cases it bears directly upon the question of consent and the improbability of the connection complained of having taken place against the will of the prosecutrix. And she may be asked, but, in as much as the question is one going strictly to her credit, she is not generally compellable to answer whether she has had connection with persons other than the prisoner. This seems to rest to some extent in the discretion of the trial judge. Whether, however, she answers it or not that is an end of the matter, otherwise as many collateral, and therefore irrelevant issues might be raised as there were specific charges of immorality suggested, and the prosecutrix could not be expected to come prepared to meet them, though she might well be prepared to repel an attack upon her general character for chastity[3]. - I am satisfied that the ruling made by the learned judge was in accordance with the established and accepted principles".

It is clear from the dicta above and others like R V. Holmes[4] that the reason for the principle of exclusion with regards to evidence of particular acts of immorality with other men, is the rule which forbids the adduction of evidence to contradict a witness on a collateral matter. Lord Coleridge stated in R V. Riley[5] that ...

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1) R V. Clarke (1817) 2 Stark 244; R V. Barker (1829) 3 C.&P. 589; R V. Holmes (1871) L.R. 1 C.C.R. 334
2) R V. Martin (1834) 6 C.&P. 562
3) R V. Hodgson (1811) R & R. 211; R V. Laliberte, 1 S.C.R. 117; R V. Holmes (1871) L.R.1 C.C.R. 334; see also R V. Boucher et al, 38 C.R. 242; and R V. Dyment (1966) 55 W.W.R. 575
4) (1871) L.R. 1 C.C.R. 334
5) (1887) 18 Q.B.D. 481

"where evidence is denied by the prosecutrix with regard to acts of connection committed by her with persons other than the prisoner, she cannot be contradicted. The rejection of such evidence is founded on good common sense, not only because it would put very cruel hardship on a prosecutrix, but also on the ground that the evidence does not go to the point in issue, that point being whether or not a criminal assault has been made upon her by the prisoner. To admit evidence of connection previously with persons other than the prisoner would be plainly contrary to the most elementary rules of evidence". As earlier pointed out, if such evidence were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. So far as sexual experience with men other than the defendant is concerned, the effect of section 2, of the Sexual Offences Act 1967 is that no evidence on this subject may be adduced and no question about such experience may be asked of the complainant without the leave of the judge to be sought in the absence of the jury and only to be granted on the ground of fairness to the defendant.

However, although the accused many not lead evidence to prove specific acts of intercourse with other men, it may be that such proof would be competent if the acts in question occured just before

and practically on the same occasion as the crime charged, on the ground that they formed part of the res gestae. The Lord Justice-Clerk observed in Dickie V. H.M. Advocate[1] as follows: "... while it is competent to prove a general bad repute at the time of the offence, or to prove that the woman said to have been attacked had yielded her person recently to the man, it is not competent to prove individual acts of unchastity with other men. Whether proof of such unchastity might be allowed if it occured just before and practically on the same occasion, I do not say. Such a case might be held as falling within the doctrine of the competency of proof of all matters forming parts of the res gestae. Such facts might have an important bearing on that branch of evidence in such cases which relates to the appearance of the private parts when examined". Also in H.M. Advocate V. James Reid and others,[2] Lord Neaves made a similar observation. He said: "The only instances I can imagine where such proof would be admissible, would be where the alleged occurrences were so closely connected with the crime charged, as to form, in fact, part of the res gestae, as where, for example, as happended in one case, the woman alleged to have been ravished had connexion with another man on the night of the alleged occurrence".

It is a question of circumstances whether evidence of subsequent conduct is competent.[3] In one case evidence was allowed of an act of immorality of the same day as, and subsequent to, the offence charged, but generally proof of subsequent character, that is, evidence

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1) (1897) 2 Adam 331 at 337 - 338
2) (1861) 4 Irv. 124 at 129
3) Macdonald, Criminal Law at 309

of unchastity after the date of the crime is inadmissible, as the case of H. M. Advocate V. Hugh Leitch[1] demonstrates. In the case, Hugh Leitch was charged with rape or assault with intent to ravish. He pleaded not guilty, and special defences were lodged, offering to prove that Elizabeth McLachlan, on whose person the offence was said to have been committed, was at that time, and still continued to be, a person of loose and immoral character, and that de recenti after the alleged injury, and on the same evening, she had been found in bed with another man. The prosecution objected to any evidence being led regarding the character or conduct of the woman subsequent to the offence charged. The counsel for the panel on the other hand argued that proof of the averments contained in the defences ought to be allowed as showing, not only the loose and immoral character of the woman, both before the alleged offence, and down to the present time, - but also the extent of the injury said to have been inflicted on her person. Lord Medwyn allowed the proof only in respect of its bearing upon the quality of the assault, and the extent of the injury said to have been inflicted upon the woman, but refused to allow evidence of her alleged immoral character subsequent to the offence charged.

Generally, where the question of intercourse with another is material to the issue of consent, such evidence we know is admissible. Thus evidence tending to show that a woman is highly promiscuous[2] or is a prostitute will be admissible, and she may be contradicted by other evidence if she denies the fact. In R V.

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1) (1838) 2 Swin. 112
2) R V. Greatbanks (1959) Crim. L.R. 450 (C.C.A.)

Manzur,[1] the defendant's were charged with rape on the complainant. The defence was consent. In cross-examining the complainant, one of the defending counsel suggested that she had been guilty of various immoral acts and had made statements to another man tending to show that she was a common prostitute. These suggestions were denied, the defence then sought to call the man to whom it was alleged, the statements had been made. And the court held that this evidence was admissible. Evidence to contradict answers to cross-examination merely to credit was not permitted, nor was evidence of intercourse with other men, for that was not relevant. But evidence might be given which showed that the complainant was of notoriously bad character for chastity, or was a prostitute, for that was relevant to the issue of consent. A witness to prove that the complainant was of such character might go on to give reasons supporting his evidence provided his evidence was directed to prostitution as opposed to mere sexual intercourse.

However, it appears that recent changes in the moral climate have been judically acknowledged as affecting the way in which these rules operate, and R V. Krauz,[2] just shows that. In that case, the accused (K) was convicted of raping J. They met casually at a public-house and went to his flat and had intercourse. K said it was with J's consent but afterwards she asked for money and they quarrelled. He called S. who said that the public-house was of ill-repute and J. frequented it for the purpose of being 'picked up'. The judge re-

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1) (1969) 54 Cr. App. R. 1 (C.A.)
2) (1973) 57 Cr. App. R. 466

fused leave for S. to be asked whether he had had intercourse with J. after a first meeting at another 'pick up' place and J. had asked for money afterwards. He also refused leave for H. to give evidence that he had met J. at a public-house and had intercourse with her on that and other occasions. In its judgement, the court held, allowing the appeal, that in an age of changing standards of sexual morality it might be harder to say where promiscuity ended and prostitution began, and it might be necessary to decide on which side of the line conduct fell. Evidence which proved that a woman was in the habit of submitting her body to different men without discrimination, whether for money or not, would seem to be admissible. The court had some doubt whether the evidence of H. would have gone far enough to take it outside the authorities which excluded the evidence of other men merely proving acts of intercourse between them and the complainant. However, the evidence of S. went near enough to proving prostitution in its accepted sense to justify its admission even on the old authorities. It would have tended to prove J.'s loose sexual morals and that she was not merely promiscuous but in the habit of having intercourse with first acquaintances for money. Further, her practice included a first demand for payment after the act was over, and tended to prove not merely consent but consent in special circumstances described by K. To admit the evidence would not have been inconsistent with any authorities the court was aware of or given rise to the objectionable consequences which had led to the general exclusion of evidence of particular acts of intercourse with other

men. On the contrary, without substantially lengthening the case or distracting the jury into side issues, it would have thrown light on the sole issue. Thus, the exclusion of the evidence rendered the verdict unsafe and unsatisfactory, and hence set aside. From this decision it is clear that in discussing the issue in contemporary times an emphasis has been laid on changing moral values. In the present case - R V. Krauz,[1] - the evidence seems to have been held to be admissible because it was to the effect that the proxecutrix was in the habit of having sexual intercourse with first acquaintances for money. It is not easy to see why it would have been less cogent evidence of consent if it had shown that she had the same habit, but made no charge of money. Again the answer may be the social permissiveness of today, because while society might tolerate the freakish tendencies of a woman it does not condone soliciting or living on the evidence of prostitution which in most societies is a criminal offence; so the exchange of money appears to have a significance, as it does seem to set a line of demarcation between the societal's acceptable phase of promiscuity and the unacceptable phase. It was, for instance, recently stated by the English committee convened to determine whether and how rape laws should be reformed subsequent to the public outcry resulting from Director of Public Prosecutions V. Morgan[2] that:[3] ".... previous sexual history of the alleged victim with third parties is .... only rarely likely to be relevant to issues directly before the jury. In contemporary society sexual relationships out-

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1) (1973) 57 Cr. App. R. 466
2) (1976) A.C. 182
3) Report of the Advisory Group on Rape and other Sexual Offences (H.M.S.O., 1975) at p. 22

side marriage, both steady and of a more casual character, are fairly widespread, and it seems now to be agreed that a woman's sexual experiences with partners of their own choice ... are (not) indicative of ... a general willingness to consent. There exists, in our view, a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today's law ...."

In Scotland, it has been held that evidence may also be led that the woman associated with prostitutes, but not that her friends were otherwise of bad character, as the decision in H. M. Advocate V. Webster and others[1] confirms. James Webster, James Stirling and William Campbell, carters in Dundee, were charged with the crime of rape, as also with assault, especially when committed with intent to ravish. The pannels pleaded not guilty, and special defences were lodged on their behalf, setting forth that the party alleged to have been ravished, was a woman of unchaste and immodest character. The principal witness deponed, on cross-examination that she was on intimate and familiar terms with a certain girl who had not been cited as a witness. The defence proposed to examine a subsequent witness, a female neighbour of the principal witness, as to the general character with respect to modesty and propriety of demeanour of the said girl. The Lord Justice-Clerk remarked: "Unless you state that your information is, that this girl is a common prostitute, we cannot allow this line of examination. We are not to put this absent party on her trial for chastity". And the examination was not pro-

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1) (1847) Ark. 269

ceeded with.

In India, the court has held that it is not enough to show the general character of the woman that she ran away with a man once or twice or that she had on specific occasions done something immoral.[1] But I have no doubt that evidence of prostitution will be admissible.

In England, evidence remote in time is sometimes entered into the courtroon, as in the case of R V. Clay,[2] where the court admitted as relevant to the issue of consent the evidence of a police officer that "some twenty years" prior to the alleged rape, the victim has been "sighted on the streets of Shrewsbury" as a common prostitute. If for nothing else, this case seems to typify the difficulties experienced by judges in the application of rules of evidence to trials where the offence charged is one of rape. Thus the report reads[3] "Patterson J., at first seemed to think the evidence was inadmissible, but, on referring to the authorities, said, - in R V. Barker,[4] ... the question was allowed to be put, as to whether the prosecutrix had walked the streets of Oxford at a period subsequent to the alleged rape. I cannot understand why that should be. I should have thought the question would more properly refer to the conduct of the prosecutrix before the act she complained of. However, upon the authority of that and two or three other cases, very like the present, I will allow the general evidence to be given". It is notable that the actual relevance of a long past event was not looked at in the context of the instant case; rather rele-

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1) Wahid v. R 36 C.W.N. 356
2) (1851) 5 Cox. C.C. 146
3) Ibid at 157
4) 3 C.&P. 589

vance was sought to be adduced in looking at previous cases unlike that in question. Even in doing so, the judge was not able to admit the evidence in any firm belief that it was relevant:[1] "...he seemed at first to think the evidence was inadmissible ... ". The doubts expressed are indicative of a fear that by declaring evidence inadmissible and excluding it, the way may be opened to a successful appeal against conviction on ground of wrongful exclusion of evidence. Judges have admitted much that is on its face seemingly irrelevant to the case in point when counsel have apparently taken advantage of uncertainties in application of rules of evidence to this type of case.[2]

The decision in R V. Clay,[3] to mind, is shaky on a number of grounds. First going into the facts, the evidence on its face was seemingly of little help: the officer on cross-examination said he was "not then a constable (at the time of the stated sighting), and it was no part of his duty to take notice of persons of that description; that he had never addressed the prosecutrix as a prostitute, and that she was living at the time he referred to with a plasterer in Shrewsbury, but subsequently remove from the town". Another important thing to note about the case is its implications, which seems to be "once a prostitute always a prostitute", and that cannot be fair.

It is gratifying to note that the criticims of R V. Clay[4] appears to be vindicated by the line of reasoning in Scotland: a similar matter came up for consideration in the case of H. M. Advocate V.

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1) (1851) 5 Cox. C.C. 146 at 147
2) R V. Gun; Ex Parte Stephenson (1977) 17 S.A.S.R. 165
3) (1851) 5 Cox C.C. 146
4) (1851) 5 Cox C.C. 146

Reid and others.[1] In that case it was proposed, in defence, to establish the unchaste character of the injured party at a past period, the exact date of which could not be precisely stated. This was objected to, and the objection was sustained. In giving judgement Lord Ardmillan said:[2] "I am of opinion, that the proposal now made to lead evidence in regard to the previous character and conduct of this woman is of a very unusual description, and one which would require to be most strictly looked to on the part of the court. The time to which the proposed evidence relates is very remote, and the counsel for the panels is not prepared to state that he can connect that remote period with the more recent history of the woman, by other evidence bringing it down to the present time. It would, in my opinion, be most unfair to the woman, to admit evidence of what is said to have taken place, it may be twelve, fifteen or eighteen years ago; at all events, without much more distinct and specific notice than has been given in this case. I do not think that what is here proposed is at all within the recognised rule as applicable to charges of rape. That rule, as I understand it, applies to proof of unchastity at and immediately before the time when the rape is said to have been committed. The prisoner's counsel may, if he thinks fit, carry that evidence of repute as far back as he pleases in order to comfirm it, but to begin the proof at a period many years back - more especially as no precedent or authority has been shown to us for such a course - appears to me to be a proceeding which cannot be

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1) (1861) 4 Irv. 124
2) Ibid at Pp. 126-7

sanctioned by the court". And Lord Neaves reiterated the same view when he said while giving his judgement:[1] "I think, in the first place, that it is clearly competent to impeach the character of the principal witness in a case of rape, to allege and to prove her bad character at the time when the injury results. If it is alleged that this character was acquired at an earlier period, still it is necessary that it be established by something like continuous evidence up to the time of the alleged offence. This is of great importance to the witness, because it may be easy for her to contradict proof of bad conduct at a particular time and place. She may prove, for example, that she was not there, but in another part of the country, at the time. The proof here offered seems to be inadmissible. I think there is no real pertinency in it, and that it would be most dangerous. To attempt to lead evidence as to a course of conduct many years back - perhaps in another country - would be quite irrelevant - at least unless under very special circumstances, and with most distinct and special notice as to the party, the place and the time".

Another relevant case in this respect is that of H. M. Advocate V. Forsyth and others.[2] In that case, a special defence having been lodged in a case of rape, averring acts of unchastity on the part of the woman three months before the alleged crime, it was proposed to ask a witness as to an act of unchastity six or seven years before, but the question was disallowed by the court.

There are still some exceptions to the general rule with respect to

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1) (1861) 4 Irv. 124 at 128
2) (1866) 5 Irv. 249

the sexual history of a rape victim. For instance, evidence of prior sexual conduct may be highly relevant where the circumstances of the previous conduct are so distinctive and so closey resemble the defendant's version of the alleged encounter with the complainant that the evidence could be classified as 'modus operandi'. We know that in order to show intent, evidence is admissible of similar acts,[1] independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction. An analogy can be drawn between such 'signature crimes' previously commited by a defendant which are admitted to show intent and distinctive past sexual behaviour on the part of a prosecutrix which could be relevant to show voluntariness (or consent) with respect to the sex act in issue.

Additionally, if the accused wishes to defend on the basis of evidence that some other person is responsible for the complainant's abused condition, then evidence of the victim's prior sexual conduct which ooccured near the time in question would be relevant to establish the origin of semen, pregancy, disease or injury allegedly arising from the rape.

Further, sexual history evidence involving victim with accused is admitted sometimes, as relevant to the credibility of the victim.[2] However, to my mind, chastity per se should have little or no relevance as factor in judging the 'credibility' of the prosecutrix as a

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1) See Post
2) R V. Cockcroft (1870) 11 Cox C.C.C. 410; R V. Holmes (1871) L.R. 1 C.C.R. 334; R V. Riley (1887) 18 Q.B.D. 481; R V. Cargill (1913) 2 K.B. 271

truthful witness. Although today in the United States of America, the position gaining favour is that the "notion that a female's sex life bears on her credibility" should be rejected, as I mentioned earlier, in English law and in the United States lack of chastity and dishonesty have sometimes been linked. However, Scotland does not appear to have ever taken a similar view as is farily discernible from the Lord Justice-Clerk statement in Dickie V. H. M. Advocate,[1] when he said: "I am of opinion that the sound and safe rule is that applied to all other cases viz, that the credibility of witnesses may not be attacked by raising proof on collateral issues as to their previous history, except where they are tainted with crime, conviction of which can be proved by extract record of a court of Justice, or where there is evidence of general repute immediately before the time of the alleged offence which may affect credibility". It is interesting to note that recently in a Report of the Advisory Group on Rape[2] they remarked that: ".... previous sexual history of the alleged victim with third parties is only rarely likely to be relevant to the issue before the jury .... (A) ..... woman's sexual experiences with partners of her own choice ... (is not) .... indicative of untruthfulness ...." This I believe is a firm confirmation of the argument that in terms of standard rules of relevance, such linking, seems not to be justified.

The approach taken by Wigmore[3] is fairly more elaborate; he is of the view that "(the) value of character evidence, impeaching or sustaining a party or a witness is commonly much exaggerated"[4] and

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1) (1897) 2 Adam 331 at 338
2) (H.M.S.O. 1976) at p. 17
3) Wigmore On Evidence (1970) Vol. 6 at p. 580, § 1908
4) Ibid

in the "ordinary case" is comparatively futile, with a "tendency to degenerate into a mere exhibition of petty local jealousies and animosities, of no real probative service ..."[1] Wigmore stated further:[2] "... as a matter of human nature, a bad general disposition does not necessarilly or commonly involve lack of veracity, and ... therefore the former is of little or no bearing probatively; .... the estimate of an ordinary witness as to another's bad character is apt to be formed loosely from uncertain data to rest in large part on personal prejudice and on mere difference of opinion on points of belief or conduct - a chance of error which is relatively small in the specific inquiry as to the other's notorious untruthfulness; and .. the incidental unpleasant features of the witness-box are largely increased when the way is opened to this broad and loose method of abusing those who are called as witnesses ....." But where the crime is one of rape, statutory rape, seduction or assault with sexual element, Wigmore took the view that chastity and veracity were in some manner linked and thus the issue of unchastity would be relevant on this basis and should be admitted into evidence.[3] However, it has been said that, any contention that rules of evidence should be premised upon-[4] "... (a) matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth when based upon that alone, whilst it does that of a woman ... What destroys the standing of the one in all walks of life has no effect whatever on the standing for

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1) Ibid
2) Ibid at Vol. 3A., § 922 at p. 727
3) Wigmore On Evidence (1970) Vol. 3 A., § 924 a, at p. 736
4) State V. Sibley (1895) 33 S.W. 167 at 171 per Burgess J. cited in Wigmore Ibid at p. 735

truth of the other", ought not even remotedly be adhered to in the courts of justice of the present day.

Additionally, evidence of the complainant's sexual conduct will be relevant for impeachment purposes in cases where the defendant seeks to introduce it in support of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.[1] Some courts and commentators have[2] expressed concern that many sexual offence accusations are made by "psychologically disturbed individuals";[3] therefore such evidence, where relevant and reliable, should be admitted in order to protect the falsely accused. The problems of psychiatric evidence of character will be considered in further detail in subsequent discussion.

It should be made clear that evidence of the prior sexual history of the victim may be adduced without putting the character of the accused in question.[4] In R V. James Turner,[5] the court held that where a prisoner charged with rape puts forward the defence that the prosecutrix consented to the act, he does not make an imputation on her character within the meaning of s.1 (f) (ii) of The Criminal Evidence Act, 1898,[6] so as to render himself liable to cross-examination on previous convictions or bad character. Further, questions and evidence which are directed to the proof of consent do not cause him to lose the benefit of the opening words of the section or render such cross-examination admissible.

Finally, one can conclude from the discussion that generally sexual history evidence is admitted into rape trial on two broad grounds.

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1) See generally - "Complainant Credibility in Sexual Offence Cases: A Survey of Character Testimony and Psychiatric Experts. (1973) 64 J.Crim.L. 67.
2) Id. at 67 nn. 2-3
3) Id. at 67
4) Halsbury's Laws of England (4th ed.) 1976, Vol. 11 § 1230 at p. 655 and § 374 at p. 207
5) (1944) K.B. 463
6) See Post

First, sexual history may be introduced to show that the woman who is complainant is of "notoriously bad character", of "abandoned character", 'who engages in an established pattern of indiscriminate sex as a prostitute' - i.e. living the life of a 'common prostitute'.[1] The evidence purportedly relates to the issue of consent, it being contended that such a woman would be more likely to have consented to the sexual intercourse. Second, any woman may be cross-examined as to sexual history as a general matter where it is not put forward that she is "living the life of a common prostitute", but simply that as she had consented in the past, this has a bearing on whether there was consent in the instant case. So, as we have seen, evidence can be entered to show that the woman is "in the habit of having intercourse on first acquaintance, whether for money or not".[2] And when the issue goes to sexual history with the defendant prior to event, evidence will be admitted not on the basis that a defence to the charge lies in that the victim was the mistress of the accused, but as having a bearing on the issue of consent. I hope the arguments for and against the propositions have been effectively mounted.

Statutes have been introduced in various jurisdictions to restrict admission of sexual history evidence,[3] but such have been criticised as encroaching upon the defendant's inalienable rights.[4] The opposing argument is that it is legitimate for the state to take a stand on the question, in order to rectify what is seen as an extreme

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1) R V. Tissington (1843) 1 Cox C.C. 48; R V. Holmes (1871) L.R. 1 C.C. R. 334
2) R V. Cockcroft (1870) 11 Cox C.C. 410; R V. Greatbanks (1959) Crim. L.Rev. 450
3) See Sexual Offences (Amendment) Act 1976 (U.K.)
4) Berger "'Man's Trial, Woman's Tribulation': Rapes Cases in the Courtroom" (1977) 77 Columb. Law Rev. 1, at 32 et seq.

lack of justice resulting from the current judicial process. In America, many states[1] and Congress[2] have endeavouredto draft rape shield statutes which recognise the delicacy of balancing opposing interests "in such a way as to dignify the complainant's role without imperiling the person accused".[3] By incorporating provisions for flexibility and discretion into the shield laws, allowance has been made for the admission of highly relevant defence evidence which is likely to be "critical" in cases where it would otherwise be excluded. In addressing the problem in relation to the Michigan Law[4] it was said:[5] "It has been argued that the evidentiary limitations provided for in the new law (i.e. total exclusion of any testimony of prior sexual relations between the victim and third parties) abridge the defendant's constitutional right to due process and to confrontation. Admitting such evidence may be logically relevant (i.e. that the existence of A makes it more likely that B has occurred), the legislature has, in the new law, determined that this testimony is not legally relevant.

Courts have in numerous circumstances, where overriding policy considerations were at stake, totally excluded evidence which may be logically relevant but which is held as a matter of law not to be legally relevant".

Comparing the policy statements eliminating admission of certain sorts of evidence in particular cases, it is further stated:[6] "An example of overriding policy considerations excluding evidence of

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1) Ibid at 100 - 103
2) See Privacy Protection for Rape Victims Act of 1978 Pub. L. No. 95-540, § 2(a), 92 Stat. 2046 (1978)
3) Berger,"'Man's Trial, Woman's Tribulation': Rape Cases In the Courtroom", (1977)77Columb. Law Rev. 1 at 100
4) For a general review of the Michigan Law, see Scutt, "Reforming the Law of Rape; The Michigan Example" (1976) 50 A.L.J. 615
5) Legislative Note, "Michigan's Criminal Sexual Assault Law" (1974) 8 Uni. Mich. Jrn., Law Ref. 217 at 229
6) Ibid.

this sort is the case of subsequent repairs made to a facility which may have caused an injury. Presently in many jurisdictions, it is clear error for a trial court judge to admit such evidence. The analogy of this example to the statutory rule excluding evidence of a victim's prior sexual conduct with third parties is compelling. In cases involving evidence of subsequent repair, the courts evolved a fixed rule of law through 'policy balancing' in individual cases: in the Sexual Assault Act, the legislature enacted a fixed rule of law after it balanced the countervailing polices for and against admision of such evidence. The distinction between the two law-making processes is probably too slight to support a finding that one is constitutionally valid and the other is not".

The method of drafting reforms have been categorised into three broad heads:- those with the "Loop-hole" approach; those with the Exclusionary approach and lastly those with the Procedural approach. We can start with examination by looking at the "loop-hole" approach.

Early experience in the application of some recently drafted rape shield laws in the United States of America indicates that the exclusion of evidence of prior sexual conduct may cause constitutional problems unless the judge has discretion to admit reliable and probative, but otherswise inadmissible, evidence when it is critically relevant to the accused's defence. For instance, the New York statute,[1] was recently threatened by a constitutional challenge in the case of New York V. Conyers.[2] Citing Davis V. Alaska,[3] the New York Supreme Court held that "but for" the statute's omnibus clause, which

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1) N.Y. Crim. Proc. Law § 60. 42 (McKinney 1975)
2) 382 N.Y.S. 2d 437, 86 Misc. 2d 754 (1976)
3) 415 U.S. 308 (1974)

allowed the court discretion to admit evidence of the victim's sexual conduct, the statute would have serious constitutional problems.[1] The relevant part of the statute provides: "Evidence of a victim's sexual conduct shall not be admissible in a prosecution for (rape) unless such evidence: ..... (5) is determined by the court after an offer of proof by the accused outside the hearing of the jury ... to be relevant and admissible in the interests of justice".

It is arguable that such laws go no further than current rules of evidence and may in fact be more harmful to the rights of the victim than of help:[2] "Arguably, laws like (these) may admit certain evidence absolutely while automatically barring nothing, thus narrowing the court's inherent powers of exclusion and expanding the material's admissibility ... At minimum the laws fulfil the purpose of flagging attention to the problem: warning defendant's not to count on using evidence of unchastity spurring prosecutors to object to its introduction, and reminding judges that this kind of proof is presumptively inadmissible and merits extremely careful scrutiny. The hope is that a clear change in the spirit of the rules will lead to a change in their application". The South Australian law illustrates the innocuousness of the "loop-hole" approach, as well as clearly demonstrating the danger that may be inherent, from the victim's perspective, in attempting to define relevance and admissibility. The Evidence (Amendment) Act, 1976 (S.A.), s. 34 (1) provides: "(2) in proceedings in which a person is accused of a sexual offence,

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1) 382 N.Y.S. 2d 437 at 444, 86 Misc. 2d. 754 at 763 (1976)
2) Berger, op.cit. (1977) 77 Columb. Law. Rev. 1 at p. 38

evidence of - (a) sexual experiences of the alleged victim of the offence prior to the date on which the offence is alleged to have been committed; or (b) the sexual morality of the alleged victim of the offence, - shall not be adduced (whether by examination in chief, cross-examination, or re-examination) except by leave of the judge.

(3) Leave to adduce evidence under this section shall not be granted except where the judge is satisfied that - (a) an allegation has been, or is to be, made by or on behalf of the prosecution or the defence, to which the evidence in question is directly relevant; and (b) the introduction of the evidence is, in all the circumstances of the case, justified". Yet without such a provision, judges are required not to admit evidence which is not relevant to the case in point.

As was stated by Wells, J., in R V. Gun; Ex parte Stephenson[1] "... s. 34 (i) (should be subjected) to .. a close and critical scrutiny. (This is) necessary ..... because the section is one likely to be placed under the considerable stress and strain created by forensic struggles arising in trials of persons for serious offences ... "[2] And: "It is unfortunate that (s.34 (i)) is likely to beset the path of a court conducting a trial for a sexual offence, already thorny enough, with a new and luxuriant crop of briars ..."[3] As pointed out by Wells, J., the section may be interpreted to enable an accused to make an unsworn statement as to the "sexual experiences" of the alleged victim, but would restrict the victim from being cross-examined on the allegations. Thus, the rights of the alleged victim

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1) (1977) 17 S.A.S.R. 165
2) (1977) 17 S.A.S.R. 165 at 185
3) Per. Bray C.J. (1977) 17 S.A.S.R. 165 at 170

could be severely hampered.[1] But a different view was expressed in R V. De Angelis,[2] where it was held that the word "evidence" in s.34i(2) has "an enlarged meaning so as to include unsworn statements". Another question is, what is to be included within the expression "sexual experiences"? The statement "I am a virgin" is not "evidence of .... sexual experiences", but in the words of Wells, J., "is some evidence of the lack of such experiences".[3] Thus, the problem arises of whether such affirmation by an alleged victim would be within the prohibition. Again, it could be regarded by those advocating more rights for the victim that a restriction upon putting into evidence a lack of sexual experiences would be negative toward those rights.

Furthermore, by restricting the evidentiaary provisions to the "alleged victim" this means that no such protection can be extended to other witnesses who come before the court not to give evidence as alleged victims of the particular ofence, but as alleged victims of a rape "perpetrated by the accused in strikingly similar circumstances".[4] If the victim is to be protected, why not other, similarly placed witnesses? Finaly, the requirement that s. 34 (i) should come into operation only when "an allegation has been, or is to be made" is in itself difficult to interpret, in view of the apparent desire of the Parliament to relieve the court scene from the admission into evidence of information both damaging and distressing and not pertinent to the crime charged. In R V. Gun; Ex parte

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1) R V. Gun; Ex parte Stephenson (1977) 17 S.A.S.R. 165 at 181-182;
2) (1979) 20 S.A.S.R.
3) R v. Gun; Ex parte Stephenson (1977) 17 S.A.S.R. 165 at 181-182
4) Ibid

Stephenson,[1] Wells, J., alluded to this problem: ".... what is there in s. 34 (i) that determines what 'allegation' may or may not be made? How are the metes and bounds of the area of permissible allegation to be drawn? Quis custodiet ipsos custodes? I could imagine a trial judge being placed in a hopeless predicament if counsel were to make allegation, in flat defiance of the spirit of the legislation, that the (alleged victim) led an immoral life, and then tendered evidence that was plainly relevant to the allegation and of indisputable cogency. I cannot at present, see how the judge could satisfactorily extricate himself from that predicament".[2] Thus it is clear that the attempt contained in the Evidence (Amendment) Act 1976 (S.A.) to have the courts administer appropriate rules fails and possibly results in a worse position for the victim.

The second most commonly taken approach in drawing up "rape-shield" laws of evidence is that of adumbrating specific types of evidence to be taken into consideration by a court, and outlawing all reference to any other evidence. This was the position taken in the Original Women's Electoral Lobby Draft Bill of New South Wales, Australia:[3]

"(2) Opinion evidence relating to the chastity or unchastity of the victim, and the evidence of the sexual reputation of the victim will not be admissible as evidence of the credibility of the victim. (3) Evidence of the existence of a sexual relationship between the accused and the victim will be admissible only where consent is in issue. (4) Evidence of prior consensual sexual intercourse or prior consensual sexual acts between the victim and any person other than

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1) (1977) 17 S.A.S.R. 165
2) R V. Gun; Ex parte Stephenson (1977) 17 S.A.S.R. 165 at 183-184
3) Published as Appendix B in the New South Wales Department of the Attorney General and of Justice, Supplement to Report (1977).

the accused shall not be admitted into evidence in any prosecution under this Amendment, except where evidence of specific instances of sexual intercourse or sexual acts are required to show the origin of semen, pregnancy, disease or injury".

The provisions were based upon the Michigan legislation.[1] Modifications were made in view of possible criticisms; for example, under the Michigan provision, evidence or prior consensual sexual intercourse or acts between the victim and any person other than the accused will not be admitted except where evidence of specific instances of consensual sexual activity are required to show the origin of semen, pregnancy or disease. This ignores the proposition that an accused may wish to bring evidence of a prior sexual relationship in order to show that it was through such relationship that the victim was "injured" rather than the "injury" having been effected by h mself. Such would be particularly pertinent to the case where the victim was alleged to have been a virgin prior to the act which is the subject of the charge. Such evidence would be relevant also in cases where the defendant declared that he had not had intercourse with the victim, but this was a case of mistaken identity, and so on. It would not be relevant where consent was in issue, the victim being alleged to have consented to the accused. It is difficult to understand the rationale of the provisions contained in the Report of The Royal Commission into Human Relationships,[2] on this point, where it seems evidence of prior sexual acts "to explain the source or origin

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1) See Scutt "Reforming the Law of Rape; The Michigan Example" (1976) 50 A.L.J. 615
2) Royal Commission into Human Relationships, Final Report, vol. 5 Pt. VII "Rape and other Sexual Offences" and "Recommendations" (1977) at pp.192 and 233.

of semen, pregnancy or disease" are to be introduced "only in a trial in which consent is in issue". A successful constitutional attack on the exclusion of similar evidence in a sex offence trial resulted in a reversal of a carnal knowledge conviction in Maryland V. De Lawder.[1] Because of jurisprudential rule excluding evidence of prior sexual conduct in prosecutions for carnal knowledge of a juvenile - under the rationale that such females were legally incapable of consenting to sexual intercourse - the accused in De Lawder had not been permitted to introduce evidence relating to prior acts of sexual intercourse by the prosecutrix with other men. The defendant had made an elaborate offer of proof indicating that the alleged victim had accused him of rape only because she believed she was pregnant by another man and was afraid to tell her mother that she had had voluntary sexual intercourse with others. On the strength of Davis V. Alaska,[2] the court held that the exclusionary rule had been unconstitutionally applied to prevent the defendant from effectively exposing the possible bias, prejudice, and ulterior motive of the prosecutrix.

Such provisions as that of The Women's Electoral Lobby Draft Bill earlier cited,[3] though detailed are arguably narrowly drawn. Some commentators have contended that an additional situation should be taken into account, namely, evidence of prior sexual acts should be introduced:[4] ".... where the prior sexual acts were part of a pattern of behaviour which was strikingly similar to (the alleged victim's) alleged behavior at or about the time of the alleged offence ...".

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1) 28 Md. App. 212, 344 A. 2d 446 (1975)
2) 415 U.S. 308 (1974)
3) Published as Appendix B in the New South Wales Department of the Attorney General and of Justice. Supplement to Report (1977).
4) This is the approach taken in the Report of the Royal Commission into Human Relationships op. cit, ante.

This inclusion has not, however gone uncriticised, primarily on grounds that "pattern behaviour" and "striking similarity" would be difficult to determine.

In answer to criticisms directed at exclusionary rules of evidence for rape cases, Berger[1] has opted for a series of guidelines to be introduced to control admissibility of evidence in the sexual history sphere. The argument put forward as a justification for the drafting of guidelines is that laws such as that of Michigan are too strict and encroach too far on the legitimate rights of the accused. Under the scheme proposed by Berger the type of evidence to be admitted includes evidence of the complainant's sexual conduct with the defendant: this will not in any way be restricted.[2] Evidence of specific acts with others than the accused will be admissible where it is sought to show that the person responsible for the act charged is not the defendant but some other person, or that the victim herself committed the injury giving rise to the charge.[3] A "pattern of sexual conduct" leading the accused to believe the woman consented will be admitted.[4] Other types of evidence include that of sexual conduct tending to prove the complainant has "a motive to fabricate the charge" and:[5] "Evidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged".

However, the approach of drawing up guidelines to restrict admissibility of prior sexual history raises problems even apart from con-

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1) Berger, op. cit, (1977) 77 Columb. L.R. 1.
2) Berger, (1977) 77 Columb. L.R. 1 at p. 99 (sub-s(1)).
3) Ibid, (sub-s. (2))
4) Ibid at p. 100 (sub-s.(7))
5) Ibid at p. 38

tentions that schemes abrogate the rights of the accused, or imply that certain sorts of assumptions may validly be made from certain types of information. It is not only sexual history evidence that may interfere with a "proper" finding by the jury, but other information of an extraneous kind - such as the clothes the woman was wearing;[1] that the parties were drinking together before the incident;[2] that the woman was hitch-hiking and accepted a life from the alleged attacker.[3] It is interesting to note that this evidence would not be eliminated by "rape-shield statutes" that concentrate solely upon the sexual history in terms of sexual relationships with persons other than the accused,[4] or with "general reputation" or "general character".[5] In the light of the opinions expressed, exclusionary rules cannot be mechanistically applied to deny admission of highly reliable and relevant evidence which is "critical" to an accused's rape defence.

Lastly, the Procedural approach is another method of drafting a "rape-shield" statute. By this, rather than restricting application of current rules of evidence by devising guidelines that may unduly restrict the rights of accused, or alternatively may abrogate the rights of a victim or other witnesses, the solution may lie in changing court procedures.

Under several schemes[6] a written motion must be made by the defendant where sexual history evidence is sought to be entered into proceedings. A hearing in camera is then to be held to determine relevance and admissibility.[7] One such scheme also provides:[8] "The

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1) See Wilson, "Victim's of Rape: The Social Context of Degradation" (1976) 9 A.N.Z. Jrn. Criminal. 249. (2) See H. Kalvern and H. Zeisel, The American Jury (1966) at 250. (3) See e.g. Report of the Select. Comtee. on Crimes of Violence in Queensland (1974) s. 9 at p. 5. (4) But note the recent Resolution on evidence in rape cases passed at the U.S. National Women's Conference in Houston, Texas, 18th-22nd Nov, 1977, that sought to oust inquiry into any sexual history, including that with the accused. (5) See Berger, op. cit. ante. (6) see e.g. Berger, op. cit. Ibid; Women Electoral Lobby, Sydney Draft Bill op. cit ante. (7) Women Electoral Lobby, Sydney Draft Bill, op. cit. ante. (8) Ibid.

court shall ensure that no questioning of the complainant is carried on in any unduly harassing or degrading manner and shall cut off any line of inquiry at the point where it is clearly exhausted or futile ... At the end of the hearing, if the court finds that the offered evidence fulfils the criteria (otherwise stated in this law) and is not otherwise inadmissible, it shall issue an order stating its findings and the evidence that may be introduced. The defendant may then use such evidence pursuant to the order of the court". A scheme of this nature could be introduced without the additional change of rules of evidence: that is, it would be more acceptable from both victim's and accused's viewpoint to retain rules without "guidelines", yet to formulate a procedure for determining admissibility. The advantage of introducing such a scheme, without tampering with rules of evidence as they exist, is that the attention of judges will thus be drawn to the need for thinking through the relevance and admissibility of the evidence. One complaint is that interjections may be made and imputations placed before a jury, so that the jury is alerted to some matters pertaining to sexual history before the judge is able to step in to rule as to admissibility. The requirement of an in camera or in chambers hearing will eliminate difficulties of this nature. Further, as the judge is required to set out the parameters of evidence to be admitted, "counsel tactics" in commencing to enter inadmissible or inflammatory evidence will be thwarted.

An addition to these procedural rules would be a requirement that

the judge formulate reasons for the conclusion that the evidence is relevant and admissible. Again this would serve the purpose of drawing the attention of the court to the necessity for dealing with the evidence in the context of the case itself, rather than by recourse to generalised patterns of thought.

The proposals of the Women's Electoral Lobby of Australia are noteworthy in this respect:[1] "(1) All rules of evidence and procedure applicable generally to crimes of assault under the Crimes Act 1900 (N.S.W.) will be applicable to the crime of sexual assault, unless it is stated otherwise in this Amendment (2) Prior to the introduction of sexual history evidence, the accused must seek leave from the judge sitting in chambers. Such application must be accompanied by a statement outlining relevance of the evidence to a material fact of the crime charged. (3) If the judge considers the statement sufficient, a hearing must be held in the absence of the jury to determine whether the evidence is admissible. (4) At the conclusion of the hearing, the judge must issue an order stating the findings and the evidence that may be admitted. (5) Reasons for admitting the evidence must be clearly stated by the judge in the order".

If due to difficulties outlined in terms of the "loop-hole" approach and the exclusionary approach to evidence reforms in rape cases the procedural approach is to be adopted it would be worthwhile to remind oneself of the words of Professor John Wigmore;[2] in his discussion of the need for judges and practitioners to improve in spirit as a prerequisite for any hope of any real gain, he expressed

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1) Women Electoral Lobby, Sydney Draft Bill (june 1978 Draft)
2) Wigmore On Evidence, 3rd ed. Vol. 1 at 263

the opinion that in the end the man is more important than the rule. He said: "All the rules in the world will not get us substantial justice if the judges and the counsel have not the correct living moral attitude towards substantial justice".

Despite the fact that evidence reform is a laudable goal, I reckon that the admissibility of evidence of prior sexual conduct will continue to be an issue of debate among legal scholars, since notwithstanding its legitimate purposes, a shield statute may conflict with the legal and fundamental rights of the accused.

(6) PSYCHIATRIC EVIDENCE OF CHARACTER

Despite trenchant criticism by Stephen[1] of the majority decision in R V. Rowton,[2] to the effect that reputation may well be based on good fortune rather than good character, in R V. Butterwasser,[3] Lord Goddard C.J., was of the view that courts would do well to pay stricter attention to the principle laid down in Rowton. If we may remind ourselves of the decision in Rowton's case; the Court of Crown Cases Reserved refused in the case to admit the opinion evidence of a witness called by the prosecution in a charge of indecent assault on a fourteen (14) year old boy preferred against a schoolmaster, on the grounds that it did not refer to the accused's reputation, a matter of which the witness had admitted he knew nothing. In the words of Cockburn C.J.,:[4] "What you want to get at is the tendency and disposition of the man's mind towards committing or abstaining from committing the class of crime with which he stands charged; but no

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1) Digest of the Law of Evidence (12th ed.) at p. 201
2) (1865) Le & Ca. 520
3) (1948) 1 K.B. at p. 7
4) (1865) Le & Ca. 520 at p. 529

one has ever heard the question - what is the tendency and disposition of the prisoner's mind? - put directly. The only way of getting at it is by giving evidence of his general character founded on his general reputation in the neighbourhood in which he lives".

Yet times change and it is clear that personal observation by trained observers may be of great importance in assisting the court to arrive at a proper conclusion. Accordingly, it is the purpose of the present discussion to examine judicial attitudes towards psychiatric evidence of character in criminal cases and to consider what the correct approach ought to be.

It has been reasonably suggested that generally, evidence should be admissible to show that a witness suffers from some mental or physical condition which affects the reliability of his evidence.[1] As pointed out in Walker and Walker,[2] evidence may be led before the judge as to the mental condition of a person who is alleged to be incompetent to testify by reason of mental incapacity, but in such a case the question is whether the person should be allowed to give evidence at all. It is not clear whether evidence may be given about the condition of a witness who actually gives evidence to the tribunal of fact. An example of a restrictive attitude towards such evidence is provided by the case of R V. Gunewardene[3] where the accused had been charged with manslaughter. At the trial, a prosecution witness had stated that the accused had attempted to bribe a co-prisoner to withdraw a statement which she had made implicating the accused. Defence witness sought to call a medical expert to show

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1) See R.S. O'Regan, "Impugning The Credit of the Accused by Psychiatric Evidence", (1975) Crim. L.R. 563, and subsequent correspondence (1976) Crim. L.R. 84
2) Walker and Walker - Law of Evidence in Scotland, § 350
3) (1951) 35 Cr. App. Rep. 80

that the witness was suffering from a particular mental state, the effect of which would have been to discredit his evidence. The trial judge, however, refused to admit the medical evidence and the Court of Criminal Appeal held that it had been rightly excluded. Lord Goddard, C.J., was of the opinion[1] that a witness called to impeach the credit of another witness was entitled to state his opinion, in examination-in-chief, but not the reasons upon which that opinion was based. "In common fairness to the witness", said the Lord Chief Justice,[2] "if that evidence were given, he might have wished evidence called to prove that he was not suffering from any disease of the mind, and the case against the prisoner ought not to be complicated by a simultaneous but subsidiary trial as to the sanity or insanity of a particular witness".

R V. Gunewardene, however, was overruled by the House of Lords in the subsequent case of Toohey V. Metropolitan Police Commissioner,[3] in which it is thought that it should be made clear that such evidence (i.e., psychiatric evidence of the witness) is admissible. In Toohey's case, which established its admissibility in English Law, Lord Pearce said:[4] "Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best But when a witness through physical (in which I include mental) disease or abnormality is not

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1) Ibid at p. 90
2) Ibid
3) (1965) A. 595; (1965) 49 Cr. App. Rep. 148
4) (1965) A.C. 595 at p. 608

capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give evidence of something which he believed that he had seen at a distance of 50 yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than 20 yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.... It is obviously in the interest of justice that such evidence should be available. The only argument that I can see against its admission is that there might be a conflict between the doctors and that there would then be a trial within a trial. Such cases would be rare, and, if they arose, they would not create any insuperable difficulty, since there are many cases in practice where a trial within a trial is achieved without difficulty. In such a case as this (unlike the issues relating to confessions) there would not be the inconvenience of having to exclude the jury since the dispute would be for their use and their instruction". It is worthwhile to examine the facts of the case itself. In that case, the accused had been charged with assault with intent to rob and a police doctor had examined the prosecutor, a seventeen (17) year old boy, soon after the alleged

incident and found him to be in a hysterical condition although the boy then gave evidence of the assault. The defence sought to obtain evidence from the doctor, who was called as a defence witness of his opinion as to what part of the boy's hysterical behaviour was attributable to alcohol and as to the boy's normal behaviour, based on his observations during the examination. At first instance, the Judge, whose decision was upheld by the Court of Criminal Appeal, refused to admit the evidence and refused to permit the doctor to give evidence of opinion beyond what could have been ascertained by looking at the prosecutor. The House of Lords held that the evidence was admissible. The real question to be determined, in the words of Lord Pearce, "... was whether, as the prosecution alleged, the episode created the hysteria, or whether, on the other hand, as the defence alleged, the hysteria created the episode. To that issue medical evidence as to hysterical and unstable nature of the alleged victim was highly relevant". Lord Pearce concluded by saying that, "Medical evidence is admissible to show that a witness suffers from some disease or defect or abnormality of mind that affects the reliability of his evidence. Such evidence is not confined to a general opinion of the unreliability of the witness, but may give all the matters necessary to show not only the foundation of and reasons for the diagnosis, but also the extent to which the credibility of the witness is affected". In addition, Lord Pearce commented that the situation envisaged by Lord Goddard C.J., in R V. Gunewardene[1] of a

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1) (1951) 35 Cr. App. Rep. 80

conflict between doctors leading to practical problems would rarely occur.[1] It is suggested that Toohey V. Metropolitan Police Commissioner,[2] is a valuable and eminently sensible decision: it is clearly important that medical evidence of the kind which it was sought to adduce should be before the jury.

Similarly in R V. Eades,[3] Nield, J., held that the Crown might adduce evidence from a psychiatrist that the accused's account of how he had recovered his memory in the interval between giving two statements was not consistent with current medical knowledge.

Recent decisions in England and the commonwealth have raised questions as to the extent to whih psychiatric evidence may be admitted in relation to the character or credibility of the accused. Although, as has been observed in Gunewardene and Toohey, the psychological condition of a witness may sometimes be important, matters of this kind will more usually refer to the accused himself. In R V. Chard,[4] the accused had been convicted of murder and had been sentenced to life imprisonment. Counsel for the defence sought to call a prison doctor who had prepared a report on the mental state of the accused where it was said: "What does seem clear to me in the light of this man's personality was that there was no intent or mens rea on his part to commit murder at any time that evening". However, the report also included the comment: "Mental illness, substantially diminished responsibility, the M'Naughten Rules, subnormality and psychopathic disorder do not appear to me to be relevant to the issue". The Court of Appeal (Criminal Division) held that the evide-

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1) See also Tapper "The case of the Hysterical Victim". 28 M.L.R. 359, 361 (1965)
2) (1965) 49 Cr. App. Rep. 148
3) (1972) Crim. L.R. 99
4) (1972) 56 Cr. App. Rep. 268

nce was inadmissible as, in the words of Roskill L.J.,[1] where the jury is dealing with "..... someone who by concession was on the medical evidence entirely normal, it seems to this Court abundantly plain, on first principles of the admissibility of expert evidence, that it is not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind - assumedly a normal mind - operated at the time of the alleged crime with reference to the crucial question of what that man's intention was". In addition, Roskill, L.J., refuted[2] Counsel's suggestion that, if the medical witness's evidence were of no value, it could have been demolished by opposing counsel or by the Judge summing up. Finally, whilst accepting the witness's expertise in matters relating to mental illness, Roskill, L.J., commented[3] that, "...neither he nor anyone else can claim to be an expert on the question of the intent of the ordinary man".

However, a somewhat different view was taken by the Judicial Committee of the Privy Council in Lowery V. R.[4] In that case, the two accused, Lowery and King, had been convicted of the murder of a fifteen (15) year old girl. Each held that the other had committed the crime; and one of the witnesses called by King was a psychologist who had interviewed both the accused and had submitted them to various personality tests. He gave evidence to the effect that King was an immature youth who was likely to be led and dominated by more aggresive and dominant men and that he might also behave aggresively

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1) Ibid at 270
2) Ibid at p. 271
3) (1972) 56 Cr. App. Rep. 268 at 271
4) (1973) 3 All E.R. 662

to comply with the demands of such a person. The psychologist also testified that the tests showed that Lowery was strongly aggressive and lacked control over those impulses. Lowery appealed on the grounds that the psychologist's evidence had been wrongly admitted as it merely tended to show disposition. The Judicial Committee decided that the evidence had been rightly admitted because, in the words of Lord Morris,[1] the psychologist's evidence, ".... was not related to crime or criminal tendencies: it was scientific evidence as to the respective personalities of the two accused as, and to the extent, revealed by certain well known tests", and was of particular relevance in view of the defences raised by the accused. It is suggested that Lowery V. R is particularly important and valuable, because of Lord Morris's recognition of scientific inquiry in the field of behavioural science.

In the subsequent case of R V. Turner,[2] the Court of Appeal were of the view that Lowery V. R was decided on its particular facts and, were unwilling to treat it as authority for the proposition that expert evidence may always be called on the issue of the accused's veracity. In Turner's case, a man charged with murder, who was not suffering from mental illness, pleaded provocation and sought to call a psychiatrist to give evidence of his personality and mental state in order to show the jury that his account of the incident was likely to be true and that he would have been provoked by what his victim had told him. The trial Judge refused to admit the evidence on the ground that psychiatrist's report contained hearsay evidence and was

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1) Ibid at 671
2) (1975) 1 All E.R. 70

irrelevant and inadmissible. The accused was accordingly convicted of murder and he consequently appealed. The Court of Appeal dismissed his appeal even though they did not regard the psychiatrist's evidence as irrelevant since, as Lawton L. J., described it:[1] "A man's personality and mental make up do have a bearing on his conduct ... Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgements". Lawton, L.J., went on to say[2] that, even though the report contained hearsay, it would not have automatically been excluded, merely modified. However, Lowton, L.J., refused to admit the psychiatrist's evidence because, in the circumstances of the case, the jury were able to form their own conclusions. "If" he said,[3] "on the proven facts a Judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is dressed up in scientific jargon it may make judgement more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does". Lawton, L.J., concluded[4] his judgement by saying that he was firmly of the the opinion that, ".... psychiatry has not yet become a satisfactory substitute for the commonsense of juries or magistrates on matters within their experience of life". It is however significant to point out that Lawton, L.J., remarked[5] that he

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1) (1975) 1 All E.R. 70 at p.74
2) Ibid
3) Ibid
4) (1975) 1 All E.R. 70 at p. 75
5) Ibid

had not overlooked the comments of Lord Parker, C.J., in D.P.P. V. A & BC Chewing Gum Ltd.[1] to the effect that science was making further inroads into the common law principle relating to opinion evidence; One must say that it is arguable that Lawton, L.J., was contradicting himself by expressing that sentiment about Lord Parker's statement as he has just expressed his reservation about a similar kind of evidence. It should be pointed out that it is thought that a Scottish Court would have excluded the evidence considered in Turner[2] and may I say rightly so too. It is equally pertinent to point out that, apart from the use of psychiatric evidence of character to affect the reliability of or credit of a witness's evidence, the cases also deal with the ability of the accused, either, to adduce psychiatric evidence for the purpose of showing dispostional incapacity (i.e., negativing any basic assumption of dispositional capacity), or of showing relatively greater dispostional capacity on the part of another, and the ability of the Crown to adduce psychiatric evidence in rebuttal. They are not, however, concerned with the ability of The Crown to adduce, at first instance psychiatric evidence to estabish the requisite dispositional capacity of the accused.

The question of psychiatric evidence relating to character has been raised in an acute form in recent Canadian cases. First in R V. Lupien,[3] the majority of the Supreme Court of Canada held that in a trial for gross indecency expert psychiatric evidence was admissible for the defence to the effect that he had a strong aversion to homosexual practices and would not, therefore, knowingly engage in

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1) (1968) 1 Q.B. 159 at 164
2) Sheriff Macphail Research Paper - § 16:21
3) (1970) 9 D.L.R. (3d) 1; (1970) SCR 263

homosexual acts. Ritchie, J., said[1] that the principle laid down in R V. Rowton was " ..... singularly inappropriate to the introduction of evidence from psychiatrists as to the accused's disposition". The value of Lupien may, however, be lessened by the fact that both Ritchie, J.,[2] and Hall, J.,[3] were at pains to emphasise the nature of the charges against the accused. Ritchie, J., in particular, stated that he thought that[4] crimes involving homosexual behaviour fell into a special class, a view which, in the view of the later decisions in D.P.P. V. Kilbourne[5] and Boardman V. D.P.P.,[6] is now of very doubtful validity. In addition, Ritchie, J., emphasised that he was not formulating a general rule regarding psychiatric evidence of disinclination to commit a particular crime, a point which was strongly taken up by Martland, J., who said that,[7] "If such evidence is held to be admissible in a case of this kind, then there would seem to be no reason why, on a charge of murder, psychiatric evidence could not be led to the innate abhorrence of the accused in respect of physical violence, or on a charge of theft, of the innate respect of the accused for private property rights". It is suggested that Ritchie, J.'s rejection of the application of Rowton was entirely correct for psychiatric evidece can, by its very nature have nothing to do with general reputation. It is arguable that with regards to psychiatric evidence of character, sexual cases including those of indecent assault might need to be put into a special category. Actually in some states in America this seems to be the position as the case of

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1) (1970) 9 D.L.R. (3d) 1 at p.10
2) Ibid at p. 12
3) Ibid at p.13
4) Ibid at p. 12; See also R V. Thompson (1917) 13 Cr. App. Rep. 61
5) (1973) A.C. 729, at 751 per Lord Reid
6) (1974) 3 All E.R. 887 at p. 897 per Lord Wilberforce
7) (1970) 9 D.L.R. (3d) 1 at p. 5

People V. Jones [1] shows. In that case, Jones was convicted upon two counts of an information charging the commission of lewd and lascivious acts upon the person of his nine year old niece. At the time of the alleged offence, Carol, the niece, was living with Jones and his wife. She testified to the conduct of Jones upon two occasions specified in the information, "and it clearly was a violation of the statue". In addition she testified that Jones indulged in similar acts "lots of days", and that on one occasion Jones "showed her four books containing pornographic pictures and writing" prior to his lewd and lascivious conduct. "Briefly stated", said the court, "what Jones did, as related by Carol, amounted to sexual relations without penetration". Jones denied having committed any of the acts or having shown Carol any poronographic books, although he admitted "having had eight or nine pictures of nude women in his bedroom". Jones and his wife testified that their sexual relationship was mutally satisfactory but his mother-in-law "told of complaint's by him that his wife did not satisfy him sexually". There was evidence that Jones had a good reputation for morality in his community. Mrs. Jones testified that Carol's reputation for truth and veracity was bad.

On appeal, while conceding the sufficiency of the evidence to support the conviction, Jones claimed error because of the rejection of the following offer of proof: "At this time, rather than bringing the psychiatrist into court and having an adverse ruling on what he would testify about, I would like at this time to make an offer of

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1) 42 Cal. 2d 219, 266 P. 2d 38 (1954)

proof that we will produce Dr. James Solomon, a duly licensed physician and surgeon under the laws of California, specialising in psychiatry ... If produced as a witness, Dr Solomon will testity that at my request he examined Mr. Rayburn Jones on two occassions, one without the use of drugs and on the second occasion with the aid of a drug known as sodium pentothal; that as a result of those examinations he reached the conclusion that Mr. Jones is not a sexual deviate .....".

The Supreme Court of California unanimously sustained this contention. Evidence of good character is relevant "(i)n the determination of the probabilities of guilt"; "the purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore he did not commit, the crime with which he is charged"; while "character is proved by evidence of the accused's general reputation in the community for the traits which are in issue", the Californian Statute providing for the control of "sexual psychopaths" states "a legislative determination that such a person is more likely to violate (the criminal statute in question) than one who has no such propensity; to some extent there is a cause and effect relationship"; from "evidence which tends to prove that a person is not a sexual phychopath, an inference reasonably may be drawn that he did not commit the offence denounced" by the statute; "the competency of expert opinion in this field of evidence is established by the statu-

tory procedure for the determination of sexual psychopathy. Accordingly, the evidence here excluded was relevant to the general issue before the jury and should have been admitted". Also, because "the only direct evidence is the charges made by Carol and the denials of Jones ... the exclusion of the psychiatrist's testimony was prejudicially erroneous".[1]

In the People's "Supplemental Memorandum" in support of the petition for rehearing, it said in part: "We do not believe that this court has come to the conclusion that evidence of character has passed from the crucible of the community to the couch of the psychiatrist". But the petition was denied. The statment of the petition is however plainly a very significant one as it strikes directly at the heart of the controversy.

"Psychiatric evidence", says Hartt,[2] "should be considered in the light of the problems it poses for the trial of the issues rather than on the basis of its conformance with an anomalous rule". The earlier cited case of R V. Lupien,[3] was followed by the Ontario Court of Appeal in R V. Dietrich[4] where the accused had been charged with non-capital murder, the defence proposed to call psychiatric evidence in support of its contention that the accused was a psychopathic personality who confessed to acts which he had not really done and who had a propensity to lie. The purpose of the contention was to explain certain confessional statements made by the accused. At first instance, Haines, J., after a lengthy "voir dire", admitted the opinions of the psychiatrists but refused to admit the bases for

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1) 42 Cal. 2d 219, 216 P. 2d 38 at 42-43 (1954)
2) "Character Evidence" in Studies in Canadian Criminal Evidence (Ed. Salhany and Carter) (1972) 259 at p. 269
3) (1970) 9 D.L.R. (3d) 1
4) (1971) 1 C.C.C. (2d) 49

those opinions unless they were placed in issue by Crown Counsel. On appeal, it was held that the psychiatrists ought to have been allowed to explain the basis for their opinions fully as such evidence had a direct bearing on a vital issue to be decided by the jury.[1] The matter, however came once more before the Ontario Court of Appeal in the case of R V. Rosik,[2] a case which Silverman has described[3] as at least maintaining the status quo in respect of attempts to develop a more enlightened attitutde towards mental illness and possibly even turning back the hands of the clock. There, the accused had been accused of capital murder and, not testifying himself, put his defence to the jury through a psychiatrist, who was permitted to relate the whole of a conversation he had had with the accused. The psychiatrist gave his opinion that the accused was suffering from organic amnesia caused by the consumption of alcohol and drugs, and thus, lacked the capacity to form the requisite intent and, further stated that if he had thought that the accused was malingering he would not have given evidence. In reply, the Crown called another psychiatrist who had also examined the accused and who gave an opinion which reflected prejedicially on the truth of the accused's assertions. During his summing up, the Judge at first instance stated to the jury that if the accused had not told the defence psychiatrist the truth regarding the amount of alcohol and drugs taken, then the foundation for that psychiatrist's evidence was gone. The accused was convicted and appealed unsuccessfully to the Ontario Court of Appeal. There

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1) (1971) 1 C.C.C. (2d) 49 at p. 67 per Gale C.J.
2) (1971) 2 C.C.C. 351
3) "Psychiatric Evidence in Criminal Law" (1971-2) 14 Crim. L.Q. 145 at p. 145

are some features in Rosik's case which are however unsatisfactory. For example, relying on Toohey V. Metropolitan Police Commissioner,[1] Schroeder J.A., stated[2] that medical evidence could be given to show that a witness has a disease, defect or abnormality of mind likely to affect his credibility. Unfortunately, there is no evidence anywhere in the report to the effect that the crown psychiatrist considered that the accused was suffering from any abnormality of mind, although Schroeder J. A., seemed to be of the opinion that the accused was suffering from such a condition. Whatever the curiosity value of R V. Rosik, it is clear from the cases that no coherent judicial policy has been devised to deal with the question of psychiatric evidence relating to character. At the outset of any consideration of such policy, it must be admitted that it is by no means easy to construct one which is likely to be both realistic and acceptable.

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1) (1965) 49 Cr. App. Rep. 148
2) (1971) 2 C.C.c. 351 at p. 381

CHAPTER 4

CROSS-EXAMINATION OF THE ACCUSED

(1) GENERAL

The significance of the discussion of cross-examination of accused persons and evidence of character lies in the provisions of Section 1 of the Criminal Evidence Act of 1898. It is a subject of overwhelming importance to the practitioner planning the defence of persons accused of criminal offences, and has been previously adumberated on more than one occasion in the polemical literature. In 1898 in England the legislature launched into life the Criminal Evidence Act of that year; that statute abolished the Common Law rule that an accused person was not competent to give evidence on his own behalf. The accused was not under an obligation to go into the witness box and give evidence but if he decided to do so justice required that limitations should be placed upon the power of the prosecution to cross-examine him as to credit. Parliament accordingly placed the accused in a special position.

Section 1 (f) of the Criminal Evidence Act, 1898, defines the extent to which the accused may be cross-examined on the subject of his disposition and character. Initially, this Act, was of general application throughout the United Kingdom, but today in Scotland, cross-examination of the accused on the subject of his disposition and character is now guided by Sections 141 (e) and (f) and 346 (e) and (f) of the 1975 Criminal Procedure (Scotland) Act. The sections

apply to solemn and summary trials respectively. And in each state of Australia, there is an equivalent[1] to the provisions contained in the English Criminal Evidence Act 1898. As there is a proliferation of the same Act in Australia, I intend to base references to the position in Australia henceforth on the relevant portion of the Victorian Statute, namely Sec. 399 of the Crimes Act 1958. Section 68 (3) of the Nigeria Evidence Act provides that an accused person may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (d) of the proviso to section 159. The provisions of that paragraph (ie. S. 159(d)) are taken almost word for word from Section 1 (f) of the 1898 Criminal Evidence Act of England. The only difference originally appears to be in Section 159 (d) (ii) where the description "Legal practitioner" is used. The English statute uses "advocate". In Nigeria, practice in the courts is not restricted to barristers alone but is extended to solicitors as well. There is another difference in the wordings now brought about by the English Criminal Evidence Act 1979, which substituted the words "in the same proceedings" for "with the same offence", in sub-section (iii). In Scotland the words "counsel or solicitor" are used instead of "advocate"; in The Republic of Ireland however, the provisions of S.1 (f) of the 1898 Act are contained word for word in S. 1 (f) of the Criminal Justice (Evidence) Act 1924.

There are countries where the position is different from the

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1) NSW: Crimes Act 1900 SS. 413A and 413B; Vic:- Crimes Act 1958 S.399; Qld: Evidence Act 1977, S. 15; S.A.:Evidence Act 1929-1976, S. 18; W.A.: Evidence Act 1906-1976 S.8; Tas:-Evidence Act 1910 S.85; see too Northern Territory Evid. Ordinance 1939-1966 S.9(7) & Papua and New Guniea Evid. and Discovery Ord. 1913-1967 S.58(1)

general position that seems common to the countries cited above. In New Zealand for instance, proviso (d) to section 5 (2) of the Evidence Act 1908, provides that cross-examination of the accused relating to any previous conviction or to his credit, may be limited by the court as it thinks proper. As it was observed in R v. Clarke[1]: "In England the basis of the protection from cross-examination upon previous convictions is largely a matter of law, whereas in New Zealand it is a matter of discretion in the trial Judge".

And there is also an important difference between Canada and England with regard to the right of the prosecution in Canada to cross-examine a defendant, who elects to give evidence as to his previous convictions, which only exist in England in a limited class of cases. Section 12 of the Canada Evidence Act permits examination and adducement of evidence as to previous convictions for the purpose of attacking credibility. And it has been said that: "The Canadian rule allowing cross-examination of the defendant on his previous convictions is strictly logical, since the Defendant is not bound to give evidence at all, and if he chooses to be a witness his liability to cross-examination on his previous convictions is only the same as that of any other witness. If it is a jury trial, the Judge will explain to the Jury that the previous convictions are relevant only in so far as they throw light on the credibility of the defendant as a witness, and not as proving his guilt on the charge on which he is presently being tried, though whether all juries always pay the necessary attention to this distinction may be open to doubt"[2]. As a

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1) (1953) N.Z. L.R. 823, 830

2) An accused with a Previous Conviction - R.B. Whitehead:- (1968) Chitty's Law Journal at 152 see also Colpitts V.R. (1966) D.L. R. 416

great deal will turn on the construction of the statutory provisions, as most of the statutes contain similar wordings as the English Criminal Evidence Act of 1898, the 1898 Act will then be used as the basis for the discussion. with reference being made to the relevant provisions of the other statutes.

(2). STATUTORY PROVISIONS OF THE CRIMINAL EVIDENCE ACT 1898

Because of the risk of prejudice peculiarly associted with character in criminall cases, Parliament decided to afford the accused a substantial , albeit not unlimited protection in the no doubt justified belief that the right to give evidence might otherwise be rarely exercised. The protection was achieved by building into the Act a complete code regulating the cross-examination of a defendant who chooses to give evidence as permitted by the Statute. The Code, as enacted by Section 1 provisoes (e) and (f), stands in full force today, subject only to one amendment to Section 1 (f) (iii) by the Criminal Evidence Act 1979. Section 1 (e) and (f) of the Criminal Evidence Act, 1898, has identical counterparts in the Commonwealth countires. In some of this jurisdictions there are certain significant additions and subtractions on the wordings of the provisions which I shall endeavour to point out as the discussion progresses. But first it is worth reading the provisions of the English Criminal Evidence Act, Section 1 provisoes (e) and (f), before considering it in more detail.

Section 1 (e) reads as follows: "A person charged and being a

witness in pursuance of this Act may be asked any question in cross-examination not withstanding that it would tend to criminate him as to the offence charged."

And in Section 1 (f) it is provided as follows:- "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be requested to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless - (i) if the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witness for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witness for the prosecution; or (iii) he has given evidence against any other person charged in the same proceedings."

Before going further with the provisions above, I would like to draw attention as earlier mentioned to some of differences that exist with similar provisions in other jurisdictions. The first noticeable difference between the provisions in England and Scotland is with respect to Section 1 (e) as enacted in Sections 141 (e) and 346 (e) of 1975 Criminal Evidence Scotland Act. The provision in Scotland

reads: "The accused who gives evidence on his own behalf in pursuance of this section may be asked any questions in cross-examination not withstanding that it would tend to incriminate him as to the offence charged." The opening words have been significantly altered and the alteration is not unimportant as Sherrif Macphail[1] pointed out, because in England section 1 (e) is not expressly confined to cases in which the accused is giving evidence "on his own behalf", and the court would not read these words into it: it has been held that it applies when one accused confines his evidence to statement exculpating his co-accused[2]. In Scotland, however, by virtue of the 1975 Act, an accused who so confined his evidence would apparently be able to claim the Common law privilege against self-incrimination. It is thought that he should not be allowed to do so. Sherrif Macphail concluded that "in addition, if the law of Scotland is altered to the effect of making an accused person a competent, but not a compellable witness for co-accused[3], and if it is accepted that such an accused should not be entitled to claim the privilege, it will be necessary to remodel paragraph (e)."[4]

Generally there is no other significant difference between the provisions of S. 1 (f) of the 1898 Act and Sections 141 (f) and 346 (f) of the 1975 Act of Scotland, since the amendment to Section 1 (f) (iii) by the Criminal Evidence Act 1979 is of general application in the U.K. - it substitutes "the same proceedings" for "the same offence". However most of the Commonwealth countries in which there are similar provisions retain the use of the original wordings "the

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1) Scottish Law Commission - Research Papers - §5:41
2) See R v Rowland (1910) 1 K.B. 458 3) See § 5:36 of Sheriff Macphail Research Papers 4) Scottish Law Commisssion Research Papers § 5:41

same offence". The significance of the changes will be discussed in later considerations. There are however other discrepancies in the words of the provisions in Scotland vis a vis the 1898 Act of England, but generally the tenor remains the same in the sense that there is no serious implication of change of principle. The Scotland Act being more recent, the drafting is more straightforward especially in the choice of words. For instance instead of the use of the word "wherewith" as in S. 1 (f) (i), the Scottish equivalent uses the words "with which"; and while in the prohibition clause of S. 1 (f) the following words are used, "A person charged and called as a witness ... " the Scottish provision puts it as "The accused who gives evidence on his own behalf"; and in S. 1 (f) (ii) while the English provision uses the word "advocate", the Scottish uses the words "counsel or solicitor". (This anyhow is a result of the rules regulating legal practice under two different judicial systems.) And in Nigeria, Section 159 (d) of the Nigeria Evidence Act, reenacts almost word for word S. 1 (f) of the 1898 Criminal Evidence Act of England. There are only two differences between the two Acts. Whereas the English statute uses the word "advocate" in Nigeria the description "legal practioners" is used. In Nigeria, a qualified lawyer performs the functions of both a solicitor and a barrister. Advocate in England means a counsel or a solicitor. The other difference is brought about by the English Criminal Evidence Act 1979, which substituted the words "in the same proceedings" for "with the

same offence" in sub-section (iii).

As earlier indicated in Australia, the relevant portion of the Victorian statute, namely S. 399 (e) of the Crimes Act 1958, is to be used as the basis of discussion. The provisions of S. 399 (e) is identical to S. 1 (f) of the 1898 Act save for the concluding portion of sub-section (ii) which I must point out is peculiar to the Victorian Act, as it does not feature in other states of Australia. The provision was inserted in 1967 [1] at the same time as spouses were made competent witnesses against each other in all criminal prcceedings. It was designed to enable a husband, for example, to impugn the motives of a perhaps vindictive wife who agreed to give evidence against him. The section provides - S. 399 (e) (ii) "... he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the accused of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution other than his wife or her husband as the case may be: Provided that the permission of the judge (to be applied in the absence of the jury must first be obtained; ... ". It should be pointed out that the other part of the addition which is the express provision that the leave of the judge must first be obtained is peculiar to Victoria and Queensland. The only other difference between the Victorian statute and the 1898 Act is that effected by the English Criminal Evidence Act, 1979 in respect of sub-paragraph (iii), which I have repeatedly

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1) Act No 7546. Section 8

pointed out.

As we shall see, in England and in other jurisidictions where provisions on similar lines have been adopted, paragraphs (e) and (f) have given rise to numerous judicial decisions so far as its construction is concerned. In Scotland, on the other hand, the only part of these provisions which has been the subject of reported decision is the second limb of paragraph (f) (ii) and the authoritative construction placed upon it since O'Hara v. H.M. Advocate[1], has never been called into question. Sherrif Macphail stated that "the reason for the absence of other Scottish authority may be that in Scotland the Crown are not astute to take advantage of every opportunity which may be technically open to them under the provisions."[2] In O'Hara v. H.M. Advocate, Lord Justice-Clerk Thomson observed:- "One can only presume that the absence of any cases on this topic in Scotland is due to the fact that the prosecutor rarely attempts to insist on the on the magnitude of his rights."[3] And the Thomson Committee say that "normally, if the prosecution has any doubt, he will refrain from attacking the accused's character"[4]. So it does appear that there is a concensus on the reason for a dearth of authorities on this aspect of law in Scotland.

(3). THE INTERPRETATION OF SECTION 1 (e)

Section 1 (e) of the 1898 Act provides: "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him

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1) (1948) J.C. 90; applied in Fielding v H M Advocate (1959) J.C. 101; H M Advocate v Deighan (1961) S.L.T. (Sh. Ct) and H M Advocate v Grudins (1976) S.L.T. (Notes) 10. 2) Scottish Law Commission - Research Papeer on the Law of Evidence of Scotland - §5:40. 3) (1948) J.C. 90 at 95. 4) Thomson. §50:24

as to the offence charged."

The sub-section seems to have been inserted in order that the legislature might ensure that the power of cross-examination was not too drastically restricted. Wigmore states that the purpose of the section was to avoid any doubt as to the propriety of asking the accused himself about intent, motive and plan.[1] This section is an enabling provision - a provision designed to facilitate the asking of questions relevant and apertaining to or dealing with the offence charged. This conclusion may seem axiomatic upon a consideration of the overall purpose of the Act, but it is as well to have it stated expressly.

In Scotland, Sections 141 (e) and 346 (e) of the 1975 Act are in identical terms to S. 1 (e) of the 1898 Act, except that they begin as follows: "The accused who gives evidence in his own behalf in pursuance of this section may be asked ..."; the significance of this alteration has already been discussed.

One aspect of the terminology of S. 1 (e) that should not go unconsidered is: "Tend to incriminate him as to the offence charged." In Jones v. Director of Public Prosecutions[2]. Lord Reid considered "the question what is the proper construction of the words in proviso (e) 'tend to criminate him, as to the offence charged". He said: "Those words could mean 'tend to convince or persuade the jury that he is guilty' or they could have the narrower meaning - 'tend to connect him with the commission of the offence charged'. If they

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1) Wigmore On Evidence - 3rd ed. Vol. 1. §194A. 2). (1962) A.C. 635 at pp. 662-663; see also Murdoch v Taylor (1965) A.C. 574, Lord Reid p. 583.

have the former meaning there is at once an unsoluble conflict between provisoes (e) and (f). No line of questioning could be relevant unless it (or the answer to it) might tend to persuade the jury of the guilt of the accused. It is only permissible to bring in previous convictions or bad character if they are so relevant, so unless proviso (f) is to be deprived of all content, it must prohibit some questions which would tend to criminate the accused of the offence charged if those words are used in the wider sense. But if they have the narrower meaning, there is no such conflict. So the structure of the Act shows that they must have the narrower meaning."

The Criminal Law Revision Committee[1] considered the question in this way: "Section 1 (e) clearly prevents the accused from claiming privileges in relation to a question directly incriminating him of the offence charged. But whether he may refuse to answer other incriminating questions is obscure. The question might arise in relation to (i) other offences which are directly or indirectly relevant as tending to show that the accused committed the offence charged or (ii) other offences which are relevant to his credibility as a witness. An example of (i) would be where the accused is charged with shoplifting in shop A, swears that he was not in the shop at the material time, is asked in cross-examination where he was and wishes to object to answer because the answers would show that he was in another shop commiting a similar offence. An example of (ii) would be where the accused is charged with theft, has made imputations against a witness for the prosecution and then gives

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1) CLRC §170, 171

evidence, is asked in cross-examination whether he has not made a number of false tax returns and wishes to object because the answer would tend to incriminate him as to the tax returns. There is no direct authority on whether the objection would be upheld in either of these cases. This may be surprising, although the question would ordinarily not arise because the accused's claim of privilege would be likely to have very much the same effect as an admission."

The Committee favoured a solution "by which the accused should have no privilege against self-incrimination in the case of questions about the offence charged or about any other offence which is admissible as tending directly or indirectly to show that he committed the offence charged but should have the privilege in respect of other offences which are relevant to his credibility as a witness. Therefore in the two examples suggested in paragraph 170 the accused could not refuse to say where he was at the time of the shoplifting, but could refuse to answer about the tax returns. To allow the privilege in the former case, even in theory, might make the law seem artificial, but it would seem reasonable to allow it in the latter case. But no privilege should, in our view, be allowed if the accused has claimed to be of good disposition or reputation, as mentioned in clause 7, for this would be inconsistent with the principle of that clause that the accuse must not be allowed to mislead the court or jury by claiming a merit which he does not possess."

The Committee's view was accepted by the Bar Council[1] and Sherrif

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1) BC. §23

Macphail has suggested "that it should be adopted in Scotland, subject to the retention of the word 'character' instead of 'disposition or reputation'".[1]

(4). THE INTERPRETATION OF SECTION 1 (f)

The provisions of Section 1 (f) and its equivalent counterpart have already been stated. The section under consideration has a prohibitory section which is absolute in its nature. It is superseded by a permission. The cross-examination must not only be brought within the terms of the permissive sub-sections, but must also be brought within the ambit of the general rules of evidence; in other words the question asked should be relevant at common law. The whole law as to relevancy is the very back-bone of the law of evidence. The Act gave full recognition to the fundamental precept that the accused should not be prejudiced by evidence of bad character and previous convictions. On the other hand cross-examination as to these matters by the prosecuting counsel was permitted when the accused put his character in issue. The legislature has effected a reconciliation in permitting cross-examination as to character only in particular instances where it is thought fit and appropriate that it should do so. The right to denegrate a man's character must be controlled by what justice requires. Wigmore says: "The Act made a broad exception in spirit to the traditional rule about character"[2]. The whole rationale - the very criterion of the reform achieved by the enactment at present under consideration is tersely stated by

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1) Scottish Law Commission - Research Paper on the Law of Evidence (1979) §5:42 2) Wigmore on Evidence, 3rd ed. Vol. 1, 194A

Lord Reading - The Chief Justice of England - in R v.Wood[1], as follows: "If the defence choose to give evidence that he is a man of good character, whereas he is a man of bad character then they are asking the jury to try the case on a false ground and the prosecution are not only entitled but bound to show that he cannot be put on the high pedestal".

The pattern of the provisions of S. 1 (f) is that although of course the cross-examination of the defendant may freely seek to convict him of the offence charged, he is invested with what is usually referred to as a "shield" in respect of other offences and of his bad character. The section begins with a prohibition on four types of question, viz - those tending to show previous charges; those tending to show previous offences; those tending to show previous convictions and those tending to show bad character[2]. Reference is then made to the situations in which such questions are permitted, which is in any of the circumstances envisaged by S. 1 (f) (i), (ii) or (iii). When any of the provisoes to S. 1 (f) comes into operation, the shield is said to be "lost" , and the consequences of that is that the defendant becomes liable to be cross-examined about the matters otherwise prohibited, and then stands in effect in the same position as witnesses generally. It will be observed that no action on the part of the accused is necessary to render questions admissible under S. 1 (f) (i), but the ommission from this part of the proviso of any reference to the fact that the accused has been charged with another offence or is of bad character renders it

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1) (1920) 14 Cr. App. R. 149 at 150 2) Cross on Evidence, 5th ed at P. 418;

difficult to reconcile some of the decisions with the strict words of the statute. So far as S. 1 (f) (ii) and (iii) are concerned, the situations must be brought into existence by the accused himself; he must either put his character in issue or cast imputations on the witnesses for the prosecution or give evidence against someone charged in the same proceedings. It is important to note that the Act is only dealing with cross-examination, which is obviously available only where the defendant chooses to give evidence. A vivid reminder of this fact is provided by R v.Butterwasser[1]. The appellant had been convicted of unlawful wounding by razor slashing. He did not give evidence on his own behalf and he neither called witnesses to his character nor cross-examined the witnesses for the prosecution on this subject. They (the witnesses) were however minutely questioned concerning their own criminal records and evidence was thereafter given of the accused's previous convictions. The appeal was allowed because the last mentioned evidence was improperly received. Lord Goddard said[2]: "By attacking the witnesses for the prosecution and suggesting they are unreliable, he is not putting his character in issue; he is putting their character in issue."

In the circumstances of this case, no other evidence of the accused's character would have been admissible. The position would be different where the accused by whatever means asserts his good character, in which case the prosecution are entitled at common law to rebut, in addition to cross-examining under S. 1 (f) (ii). It is

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1) (1948) 1K.B.4; (1942) 2 All E.R. 415 2) (1948) 1 K.B.4 at p.7; (1947) 2 All E.R. 415 at 416

important to remember that S. 1 (f) must in England be read subject to S. 16 (2) of the Children and Young Persons Act 1963. By the provision of that Act, someone aged 21 or more cannot be asked about convictions before he was 14. The proviso must also be read subject to the practice direction of 30th June 1975, made in consequence of the Rehabilitation of Offenders Act, 1974. The practice direction made by the Lord Chief Justice on 30th June 1975 provides that, whenever it can reasonably be avoided reference should never be made to a "spent conviction" in such proceedings, and never without the authority of the judge which may not be given unless the interest of justice so require.

Before discussing the situations in which cross-examination of the accused person is permitted, it will be convenient to begin by considering the construction of the prohibition.

(i) THE PROHIBITION

"A person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character ..."

Little difficulty is to be found in identifiying the first three kinds of prohibited subject matter, previous offences, previous convictions or previous charges. Questions tending to show bad character may be more difficult. In R v. Yates[1] it was said that bad

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1) (1970) S.A.S.R. 302 at 305

character means more than lack of refinement or sensibility in the context of an accused's demeanour towards the victim of his alleged rape. We shall see that in this section "character" means both disposition as well as repute, so that unless one or other of the provisoes operate to remove the shield, the accused is protected from cross-examination as to credit except in the sense that matters raised in his defence may be challenged[1]. Problems have been raised woith regard to the meaning of the words "tend to show", the meaning of the word "charged" and the relation of the prohibition to the permissions conferred by the rest of S. 1 (f). Problems have also been raised with regard to the relation between the prohibition and the statutory provision in S. 1 (e), that the accused may be asked any question in cross examination notwithstanding that it would tend to incriminate him as to the offence charged. These problems were considerd by the House of Lords in the leading cases of Jones v. Director of Public Prosecutions[2], Stirland v. Director of Public Prosecutions[3]; and Maxwell v. Director of Public Prosecutions[4].

"If asked shall not be required to answer":-

It has been suggested that it should be made clear that in Scotland, as well as in England (and in other jurisdictions with equivalent provision) the prohibition in proviso (f), although absolute, does not prevent questions concerning his record being put to the accused by his own advocate in examination-in-chief or re-examination on the comparitvely rare occasions when he wishes to testify on that

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1) Malindi v R (1967) 1A.C. 439; R v Donninni (1972) 128 C.L.R. 114
2) (1962) A.C. 635; (1962) 1 All E.R. 569 3) (1944) 2 All E.R.13
4) (1935) A.C. 309

subject. Such words as "shall not be asked" and "shall not be required to answer" are considered to be inapplicable to evidence which is tendered voluntarily in chief. In Jones v. Director of Public Prosecutions, Lord Reid said[1]: ".... I turn to consider proviso (f). It is an absolute prohibition of certain questions unless one of the other three conditions is satisfied. It says that the accused 'shall not be asked, and if asked shall not be required to answer', certain questions. It was suggested that this applies to examination-in-chief as well as to cross-examination. I do not think so. The words 'shall not be required to answer' are quite inappropriate for examination-in-chief. The proviso is obviously intended to protect the accused. It does not prevent him from volunteering evidence, and does not in my view prevent his counsel from asking questions leading to disclosure of a previous conviction or bad character if such disclosure is thought to assist in his defence".

But questions by the judge or counsel for a co-defendant would be caught by the Act[2]. R v.Ratcliffe[3] is a case which raises a question whether a series of interogatories put by the learned Recorder to the appellant in the witness box infringed S. 1 (f) of the Criminal Evidence Act 1898. The appellant and three other men were charged with shop-breaking, larceny and receiving. The alleged offences took place during riots in Liverpool when there was looting of shops. The police evidence was that the appellant was one of two men caught red-handed in the shop, and that the police took the men from the shop out into the street and to the police station. The case for the

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1) (1962) A.C. 635 at 663; (1962) 1 All E.R. 569 at 575 2) R v Roberts (1936) 1 All. E.R. 23 3) (1919) Cr. App. R. 95

appellant was that he was standing outside the shop and had nothing to do with stealing or looting: he was merely standing by and was pushed into a corner and arrested by the police. The issue for the jury was whether they were satisfied beyond reasonable doubt that the appellant was one of the two men who had been arrested in the shop. The appellant stated in the witness box that he had been to sea as a fireman and he concluded his statement by saying that he had a good character for the ship. The learned Recorder then put to him a series of questions about his having been in the army and in the Merchant Service. The Lord Chief Justice said in his judgement: "The appellant in this case had not put his character in issue, nor made any imputation on the character of the prosecutor or witness for the prosecution. Therefore he was within the protection of S. 1 (f). The learned Recorder proceeded to put a series of questions to the appellant. There are some 18 questions which, in our opinion, are questions tending to show that this man had been convicted of other offences. It is impossible to read the questions without coming to the conclusion that those who heard them must have thought that the Recorder had some information which was adverse to the appellant, and which reflected on the appellant to his discredit. We have come to the conclusion that that series of questions was an infringement on S. 1 of the Criminal Evidence Act. .... [T]he conclusion at which we are compelled to arrive is that these questions were tending to show that the appellant had committed another offence."[1].

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1) (1919) 14 Cr. App. R.P. 95 at P.99

"Any questions tending to show":-

The meaning of the phrase "tending to show" came up directly for a decision in Jones v. Director of Public Prosecutions[1]. In March 1961, the appellant was convicted of rape of a young Girl Guide. In June 1961, he was tried for the non-capital murder of another young Girl Guide who had been indecently assualted and strangled, one month after the previous crime. There were significant similarities between the two cases. On the second trial the cross-examination of a police officer by the appellant's counsel and also the appellant's own evidence-in-chief made the jury aware that he had earlier had "trouble with the police". The appellant (who had previously set up an alibi now admitted to be false) gave evidence that he spent that night in question with a prostitute, and he gave an account of his wife's stormy reaction to his late return home, and her subsequent conversation with him. His explanation of his previous false alibi was that he was worried because earlier he had been "in trouble". It was known to the prosecution that the account which he had given of his movements, and of the conversation with his wife were almost precisely similar to the story which he had told when charged with the rape. The judge gave leave to the prosecution to cross-examine the appellant regarding the two explanations, with a view to showing the similarities between them, and so as to suggest that his evidence should not be believed. Although the terms of the cross-examination did not actually show that he had committed another offence, it was

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1) (1962) A.C. 635; (1962) 1 All E.R. 569

common ground among the members of the House of Lords who heard the appeal that the questions suggested that he was a person of bad character who had previously been suspected of, if not charged with, a serious crime. Jones was convicted, and the propriety of the cross-examination was challenged in the Court of Appeal. That court held that proviso (f) had not been infringed because the words "tending to show" mean "make known to the jury", and the jury had already been made aware of the fact that the accussed had previously been in trouble by means of his evidence-in-chief[1]. Jones appealed to the House of Lords, on the ground that the cross-examination permitted bythe judge was inadmissible because the questions were excluded by the section of the 1898 Act as "tending to show" that he had committed or been convicted or been charged with an offence other than that with which he was then charged, or was of bad character. However the House was unanimously in favour of dismissing the appeal. Lords Simonds, Reid and Morris did so for the reason given by the Court of Criminal Appeal, but Lords Denning and Devlin expressly disagreed with it. They were in favour of dismissing the appeal on the broader ground that the cross-examination was relevant to the issue of the prisoner's liability because it tended to disprove his alibi; a considerable strain was put on the credulity of the jury when they were asked to believe that identical alibis were true, and that identical conversations took place between Jones and his wife. Lords Simonds, Reid and Morris were of course also of opinion that the cross-examination was relevant for this reason, but, in their

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1) R v Jones (1962) A.C. 635; (1961)3 All E.R. 668

view, that did not of itself suffice to render the questions admissible under the statute[1]. Had Jones not alluded in-chief to his previous trouble, the majority would have allowed the appeal; unless they would have been prepared to apply what is now the proviso to S. 2 (i) of the Criminal Appeal Act, 1968, and dismiss the appeal on the ground that there had been no miscarriage of justice.

The Criminal Law Revision Committee did comment on the decision in Jones v. Director of Public Prosecutions[2] in the following words: "The majority, ... held that the words 'tending to show' in paragraph (f) meant tending to show for the first time, so that the prohibition in the paragraph would not be infringed if evidence of the conduct had already been given, whether by the accused himself (as happened in the case in question) or (when this was admissible at Common Law) by the prosecution. The minority disagreed with this view and considered that 'tending to show' meant tending to show when regarded in isolation. The result was that all five members of the House of Lords held that the disputed question was admissible, but for different reasons"[3]. The Committe then went on to say in conclusion that: "On the question of 'tending to show' in paragraph (f), we adopt the majority view, so that cross-examination of the accused about his misconduct will not be forbidden if the misconduct has already been mentioned at the trial. This result is secured by the combination of sub-section (1) and (2) of clause 6, Sub-section (1) contains the general prohibition of cross-examination 'tending to

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1) R v Congressi (1974) 9 S.A.S.R. 257 at 263 2) (1962) A.C. 635
3) CLCR 116

reveal to the court or jury' the fact that the accused has committed other misconduct; subsection (2) removes the prohibition in relation to misconduct which is admissible in evidence as mentioned."[1] [Subsection 3 contains a provision analogous to Subsection (2), to remove the prohibition in relation to misconduct of one accused which is admissible on behalf of a co-accused for the purpose of showing that the latter is not guilty of an offence with which he is charged.]

It is clear that the majority view in Jones's case must be taken to represent the present English law. The minority view is difficult to reconcile with the wording of the 1898 Act, but as Lord Denning pointed out, the majority view may operate harshly because : "It is one thing to confess to having been in trouble before. It is quite another thing to have it emphasised against you with devastating detail."[2]. The harshness is all the greater when the revalation is made in the course of the prosecution case. It is pertinent to consider the case of R v. King[3] in this regard, because the question put in that case may perhaps have been justified by the fact that the accused had impliedly admitted to homosexual practices in his statement to the police. The appellant had been convicted of various acts of indecency with two young boys. He admitted in evidence that he had met the boys at a public lavatory and invited them to sleep at his flat. But he denied that any indecent acts had taken place. In the course of cross-examination he was asked: "Are you a homosexual?" and gave the answer "Yes". One of his grounds of appeal was that

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1) CLRC 117 2) Jones v D P P (1962) A.C. 635 at 667; (1962) 1 All E. R. 569, at 577 3) (1967) 2 Q.B. 338; (1967) 1 All E.R. 379; (1967) 2 WLR 612

this question should not have been allowed. A startling feature of the case is that the Court of Appeal dismissed the appeal on this point without making any reference to Section 1 (f) of the Criminal Evidence Act, 1898. It is inconceivable that the Court of Appeal could have overlooked this familiar statute, particularly since counsel cited Malindi v R[1], a Privy Council case which turned upon an identical provision in the law of Rhodesia. It is thought that the only explanation for the omission is that the court thought that the question fell so clearly outside Section 1 (f) that point was not worth mentioning. Hoffmann is of the view "that the question probably did fall outside Section 1 (f) but it was not so obviousas all that"[2].

Lord Parker C. J., who delivered the judgement of the court , said that in his opinion evidence of the appellant's homosexuality was admissible under what is commonly called the "similar fact" rule, or the rule in Makin's case, after its well-known formulation by Lord Herschell in Makin v. Attorney General for New South Wales[3]. Lord Parker this time did not cite Lord Herschell's words but referred to an almost equally famous statement of the rule by Lord Sumner in Thomson v. R[4]: "No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime but, sometimes for one reason and sometimes for another, evidence is admissable, not-withstanding that its

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1) (1966) 3 WLR 913 2) Cross-Examination of the Accused - 83 L.Q.R. 186 at 187 3) (1894) A.C. 57 4) (1918) A.C. 221 at 232

general character is to show that the accused had in him the making of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence, which, unexplained, the facts might wear".

As Hoffman rightly stated: "The difficulty is that even if it is accepted that the evidence was admissible under the Makin rule, this is not the end of the case. There is still the problem of S. 1 (f). Until the decision of the House of Lords in Jones v. Director of Public Prosecutions[1], it was commonly thought that if the prosecution were entitled to adduce evidence under the Makin rule, they could also ask questions about the same matters in cross-examination[2]. Lord Parker's reasoning in King looks at first sight like a reversion to this view. The section is now to be given a literal construction and if a question falls within the prohibited classes it may not be asked, not withstanding that the prosecution could have adduced evidence-in-chief to the same effect. The question must therefore pass two tests. First, it must be relevant and admissible (eg. under the Makin rule) at Common Law. Second, it must not infringe the prohibitions of Section 1 (f). This double requirement has recently been affirmed by the privy council in Malindi v. R[3]. The only point made by Lord Parker beyond saying that the question was admissible under the Makin rule was that the appellant's admission to being a homosexual did not necessarily mean that he had actually committed any offences. This is a rather mysterious remark because it does not seem relevant either to whether the question was admissible at common

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1) (1962) (1962) A.C. 635 2) See Lord Denning Ibid at 671; and Lord Devlin Ibid at 704 3) (1966) 3 WLR 913

law or whether it was excluded by Section 1 (f)"[1].

As we know from earlier discussion, at common law, evidence may be admissible under the Makin rule notwithstanding that it shows the commission of other offences[2], or it may be inadmissible even though it does not[3]. Section 1 (f) also excludes not only questions showing other offences but also questions which tend to show that the accused is "of bad character". The judgement in R v. King[4] does not consider whether the disputed question could tend to show that the appellant was of bad character but prima facie one would have thought that it could. In Malindi v, R[5], the Privy Council took the view that a question tended to show bad character when its relevance if any, was to show that the accused was the sort of person who would have a disposition to commit the offence charged. By this test the question put to King must surely have come within the prohibition.

This leaves only one ground upon which the Court of Appeal might have thought that the question fell outside Section 1 (f). And in this regard, Hoffman said: "In Jones v. D.P.P. a majority of the House of Lords decided that in Section 1 (f) the words 'tends to show' means 'tends to reveal'. A question cannot tend to show bad character and so forth if it elicits facts which the jury already know. This may have been the position in King. It seems that in the course of the prosecution case the police gave evidence of the appellant's answers to questions about what he was doing at the public lavatory. The accuracy of the answers does not appear to have been

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1) Cross-Examination of the Accused, 83 L.Q.R. 186 at 188 2) R v Straffen (1952) 2 Q.B. 911 3) R v Cole (1941) Cr. App. R. 42
4) (1967) 2 W.L.R. 612 5) (1966) 3 W.L.R. 913

contested and their nature, was such that the jury could reasonably have inferred that the accused was a homosexual. It is therefore arguable that when the question was specifically put to the appellant, his answers told the jury no more than they already knew. By the above process of elimination one is driven to conclude that this construction of 'tends to show' must have been the reason why the Court of Appeal thought it unnecessary to refer to Section 1 (f). But it is respectfully submitted that it would have been helpful if they had expressly said so"[1].

One other criticism of the majority view in Jones's case was made by Lord Devlin[2] in his judgement with the help of examples, to the effect that, there may be cases in which it would be difficult if not impossible, to expose a false alibi by reference to the fact that the accused was in prison or with his mistress at the material time because the alibi was raised for the first time after the case for the prosecution had been closed.

And one final important point to note is that it is the effect of the questions put that must be considered; inother words, if a question infact has the effect of revealing prohibited matter, if truthfully answered, it is improper:- for example, a question which, if answered truthfully, would oblige the defendant to say that he had been in prison at a certain time. A case in point is R v. Haslam[3]. In this case the appellant was charged on an indictment containing two counts, the first of which charged him with obtaining by false pretences food and money from one Margaret Edmunson, and the

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1) L. H. Hoffman, "Cross-Examination of the Accused" 83 L.Q.R. at p. 189 2) (1962) A.C. 635 at 695; (1962) 1 All E.R. 569 at 596 3) (1916) 12 Cr. App. R. 10

second of which charged him with obtaining by false pretences money from one John James Almond. On the charges, A. T. Lawrence J. said: "Without founding our decision upon the fact that the pretences alleged were proved (so far as they were proved) by answers procured by leading questions, we are of opinion that this conviction must be quashed. We have come to that conclusion because we are satisfied that when at his trial the appellant offered himself as a witness, questions were put to him in cross-examination which were in flat contradiction to the terms of the Criminal Evidence Act, 1898, S. 1 (f). The effect of that enactment is to forbid a prisoner who is called as a witness on his own behalf being asked, or if asked being required to answer, any question tending to show that he has committed or convicted of or been charged with any offence other than that which he is then charged. None of the exceptions to that provision are relevant here, but nevertheless the appellant was subjected to a long cross-examination which put him in the dilema that he must either commit perjury or admit that he was in prison at the time referred to by counsel. That was a method of cross-examination which is in direct opposition to the provisions of the Act of 1898. Moreover, in his summing up, the Deputy-Recorder directed the jury that in deciding whether or not the appellant was guilty or not, they were entitled to take into consideration the fact that he had not been able to give satisfactory answers to the questions put to him in cross-examination."[1]

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1) Ibid at 10-11

Often the effect of a line of cross-examination must be looked at; the whole line may contravene the prohibition, even though individual questions may be perfectly proper in themselves. The prohibition is not limited to questions taken individually.

"Committed or been convicted of or been charged with":-

Here, the prohibition is not limited to actual convictions and even questions tending to show the commission of an offence not charged must be disallowed, for example, questions tending to show acts of dishonesty concurrent with, but other than those charged.[1] The meaning of the word 'charged' was properly raised and discussed in Stirland v. Director of Public Prosecutions[2]. In the case, the House of Lords overruled the decision of the Court of Criminal Appeal[3]. The appellant, who was charged with forgery and kindred offences, put his character in issue and specifically stated in his examination-in-chief that he had never before in his life been charged with any offence. The prosecutor asked various questions in cross-examination about his previous employment at a bank and the reasons for the termination of that employment. He was asked whether he had been questioned about a suggested forgery and whether he left after an interrogation about a particular signature. The Court of Criminal Appeal held that the cross-examination was relevant and admissable as going to the credibility of the appellant. The House of Lords upset this decision. It was held that the appellant must have intended to use the word "charge" in his evidence-in-chief in the sense which it bore in S. 1 (f) of the Act, ie., accused before a court. The cross-

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1) R v Wilson (1915) 11 Cr. App. R. 251 2) (1944) A.C. 315 3) See (1943) 29 Cr. App. Rep. 154 and (1944) 30 Cr. App. R. 40

examination was not relevant either as a challenge to the veracity of the appellant's evidence or as going to disprove good character. It is no disproof of good character that a man has been suspected or accused of a previous crime. Questions along these lines are irrelevant to the issue of character and can only be asked if the accused has given direct testimony to the contrary.

The judgement of the court in this case was delivered by Lord Simon L.C. In concluding his speech in the case, on the rules as to the cross-examination as to credit of an accused person in the witness box, Lord Simon L.C. made six propositions. The first one merely states the effect of S. 1 (f). The second one says that an accused person "may, however, be cross-examined as to any of the evidence he has given in chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not to be believed on his oath." As one can decipher from the facts above, the accused had been questioned before leaving his previous employment and was presumably well aware of the suspicions. Accordingly, he could presumably have been cross-examined on the subject if he had said in-chief that he had never previously been suspected of an offence. According to Lord Simons's fifth proposition "it is no disproof of good character that a man has been suspected or accused of a previous crime." Such questions as "Were you suspected?" or "Were you accused?" are inadmissable because they are irrelavnt to the issue of character, and can only be asked if the

accused has sworn expressly to the contrary. When he does this, he may be said to have adopted a particular method of putting his character in issue. And according to the sixth proposition, the fact that a question put to the accused is irrelevant is no reason for quashing his conviction, though it should have been disallowed by the judge. If the question is not only irrelevant but is unfair to the accused as being likely to distant the jury from considering the real issues and so lead to a miscarriage of justice, it should be disallowed, and if not disallowed, is a ground on which an appeal against conviction may be based. For example in Burrows v. R[1], the accused was charged with the wilful murder of her husband. In cross-examination of the accused, who gave evidence on her own behalf, counsel for the prosecution, in relation to an occasion three years previously, when a gun had exploded, put questions to her with a view to suggest that she had fired it with intent to murder. Questions were also put concerning her relation with her previous husband, particularly concerning complaints by him as to her extravagance and as to his divorcing her; however I must say that apart from portraying the accused in a bad light these questions were irrelevant. The accused was convicted. On appeal, the conviction was quashed and a new trial ordered on the ground that the cross-examination in relation to the discharge of the gun contravened Section 8 (i) (e) of the Evidence Act 1906-1930 of Western Australia - [which is an equivalent counterpart of S. 1 (f) of the English Criminal Evidence Act 1898].

Thus as it is clear that the convictions may be quashed as a result

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1) (1937) 58 C.L.R.249;

of the admission of such irrelevant questions[1] as in the above case, it has become the practice of doubtfull cases for counsel for the production to obtain the leave of the judge before putting his questions as to credit to the accused persons[2].

It has been suggested[3] that the wording - "committed or been convicted of or been charged with" - would be wide enough to include previous offences with which the accused had been charged, but of which he had been acquitted, though questions of relevance often arise in relation to previous acquittals. A case which appears to come close to supporting that principle is R v. Constantine Nicoloudis[4]. The appellant was convicted of obtaining money by means of a forged cheque. The cheque bore the signature of D. W. G., a friend of the appellant, but D. W. G. denied having signed it. The appellant's defences were (i) that D. W. G., had signed the cheque; (ii) that he (the appellant) was not the person who had presented the cheque at the bank or obtained the money. He did not put forward the defence that, if the cheque was forged, he had no knowledge of the forgery. In his evidence the appellant stated that he had never been convicted of any offence, and was cross-examined by prosecuting counsel on having been charged with forging a cheque on a previous occasion where the charge had subsequently been withdrawn. It was held that such cross-examination might well have been admissable if the issue in the case had been whether the appellant knew the cheque named in the indicement to be forged; but no such issue having been

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1) See R v Maclean (1926) 19 Cr. App. R 104 2) See R v Ogala Nweze & Ors (1957) 2 F.S.C. 27 (Nigeria) 3) A practical Approach to Evidence. - By Peter Murphy at p.95 4) (1954) 38 Cr. App. R. 118

raised, cross-examination which had not resulted in conviction was inadmissable and the conviction was accordingly quashed.

However the case of R v. Wadey[1] seems to me to decide contrary to both the principle stated above and the case of Nicoloudis. In Wadey's case, the appellant was charged with indecent assualt on three young girls, and put his character in issue. In cross-examination he was asked a number of questions with regard to previous complaints by other young girls of similar conduct on his part. Those complaints had led to charges which in every case had been either dismissed or not proceeded with. Similar questions were put in cross examination to a witness called by the appellant to character. It was held that the cross-examination was inadmissable and the conviction was quashed. I am in favour of the decision in R V Wadey because I do not think that the wording in question include cases where the accused had been acquitted of the offence charged, and to my mind neither the case of Striland v. D. P. P.[2], nor any literal explanation could be said to suggest that. And if we intimate ourselves with Maxwell v. D. P. P. [3], we will see that the House of Lords had laid down that even if an accused put his character in issue one could not ask him whether he had been previously charged with an offence of which he had been acquitted or where the case had not been carried to conviction. Viscount Sankey L. C., had said in that case that: "The mere fact that a man has been charged with an offence is no proof that he had committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the

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1) (1935) 25 Cr. App. Rep. 104. 2) (1944) A.C. 315; (1944) 2 A11 E.R.13.
3) (1935) A.C. 309

acts for wich he is actually being tried nor does it go to his credibility as a witness";[1] but it should be added that it may show knowledge.[2]

On the other hand, it is actually open to question whether R v. Nicoloudis[3] could be used to support the suggestion that the wording "committed or been convicted or or been charged with" - would be wide enough to include previous offences with which the accused had been charged, but of which he had been acquitted. A more plausible ground on which the decision in that case could be rationalised is that what the court was saying is that, had the issue been whether the accused knew that the cheque was forged, it might have been possible to show that he was dealing with other cheques, but in the present case his defence was that he was not the person who went to the bank and therefore the questions were irrelevant and highly prejudicial. If this explanation of the decision is correct then there is nothing wrong with it after all and R v. Wadey cannot be said to contradict it in the circumstances, just as it cannot be said that the decision in any way supports the above proposition.

Also a case of pertinence is R v. Sugarman[4]. The appellant, who was charged with receciving part of the proceeds of several cases of shopbreaking and housebreaking, put his character in issue at the trial, and was asked in cross-examination a series of questions suggesting that he had feloniously received other portions of the stolen property (of which there was no evidence) and that a sum of

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1) Maxwell v. D.P.P. (1935) A.C. 309 at 320 2) See R v Waldman (1934) 24 Cr. App. R. 204 3) (1954) 38 Cr. App. Rep. 118 4) (1935) 25 Cr. App. Rep. 109

money found on him on arrest represented the proceeds of the sale by him of those portions of the property. The court held that the cross-examination was inadmissible as offending the principle laid down by the House of Lords in Maxwell v. Director of Public Prosecutions, and the conviction was accordingly quashed. And in R v. Savory[1], where the accused was cross-examined as to a complaint that on a previous occasion he had committed a similar offence for which no prosecution had begun, his eventual conviction was quashed.

"Any offence":-

It is thought that the absence of limitation shows that the prohibition extends to offences committed after, as well as those committed before, the offence charged[2]. Where the shield is thrown away, it is therefore proper (subject to the judge's discretion) to cross-examine about such offences, and it has been held to be within the judge's discretion, in such a case to allow cross-examination of an accused, otherwise of good character, about offences committed some ten months after the offence charged. In R v. Coltress[3], the accused was charged with the theft of a bottle of whisky from a store. At his trial his defence involved imputations on the character of witnesses for the prosecution. At the time of his arrest, the accused had been a man of good character, but ten months later before his trial, he had been convicted of the theft of a credit card and of obtaining credit by the use of that card. The judge, in his discretion, permitted the prosecution to cross-examine the accused as to those convictions. The accused was convicted and appealed. Orr, L.

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1) (1942) 29 Cr. App. R. 1 2) R v Wood (1920) 2 K.B. 179 3) (1978) 68 Cr. App. R. 193

J., giving the judgement of the court, said: "The next ground of appeal was that the judge wrongly exercised his discretion in allowing cross-examination of the defendant as to the convictions in question, which took place ten months after his arrest for the offence on which he was being tried, and it was argued that at the time of the offence the accused was a man of good character and would have remained so had the trial taken place before the subsequent convictions of which evidence was admitted. For this reason it was said, it was a wrong exercise of discretion to admit the convictions in evidence". His Lordship concluded by saying that the court was in no doubt that the trial judge had in mind the fact that these were subsequent convictions in coming to the conclusion whether they should be admitted in evidence, and as such they could find no substance in this ground of appeal and it was dismissed accordingly.

"Or is of bad character":-

The meaning of character will be auspiciously considered when discussing the interpretation of Section 1 (f) (ii)

(ii) THE RELATION OF THE PROHIBITION TO THE PERMISSION CONFERRED BY THE REST OF S. 1 (f)[1] - Maxwell v. Director of Public Prosecutions[2]

Where the accused "throws away the shield" provided by the first part of S. 1 (f), it would be wrong to suppose that he can always be asked questions tending to show that he has committed, been convicted of or charged with other offences or is of bad character, because such questions must be relevant either to his liability or else to

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1) SS. 141 (f) and 346 (f) of the 1975 Scotland Act; S.399(e) of the 1958 Crimes Act (Victoria); S.159(d) of the Nigerian Evidence Act
2) (1953) A.C. 309

his credit. The decision of the House of Lords in Maxwell v. Director of Public Prosecutions made that clear. In that case, the accused, a medical doctor charged with manslaughter gave evidence of his general good character, by asserting that he was of "good clean, moral character". The allegation against the accused being that he had performed an illegal abortion, which had resulted in death, he was then cross-examined to show that on a previous occasion, he had been charged with, but acquitted of, the same offence in similar circumstances. The questioning was held to be improper. Although he had given evidence of his good character, and although the fact that he had previously been charged was within the terms of the section, the evidence of the previous acquittal was simply not relevant, because it did not have the effect of contradicting the evidence of the defendant in chief. Stripped of that quality of relevance, it lacked any evidential value and was purely prejudicial. Viscount Sankey, L. C., in his judgement in this case, made some vital observations, about proviso (f), he said: "The substantive part of the proviso is negative in form and as such is universal and is absolute unless the exceptions come into play. Then come the three exceptions: but it does not follow that when the absolute prohibition is superseded by a permission, that the permission, is as absolute as the prohibition. When it is sought to justify a question it must not only be brought within the terms of the permission, but also must be capable of justification according to the general rules of evidence

and in particular must satisfy the test of relevance. Exception (i) deals with the former of the two main classes of evidence referred to above, that is, evidence falling within the rule that where issues of intention or design are involved in the charge or defence, the prisoner may be asked questions relevant to these matters, even though he has himself raised no question of his good character. Exceptions (ii) and (iii) come into play where the prisoner by himself or his witness has put his character in issue, or has attacked the character of others. Dealing with exceptions (i) and (ii), it is clear that the test of relevance is wider in (ii) than in (i); in the latter, proof that the prisoner has committed or been convicted of some other offence, can only be admitted if it goes to show that he was guilty of the offence charged. In the former (Exception (ii)), the question permissible must be relevant to the issue of his own good character and if not so relevant cannot be admissible. But it seems clear that the mere fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune. It seeemed to be contended on behalf of the respondent that a chargewas per se such evidence that the man charged, even though acquitted, must thereafter remain under a cloud, however innocent. I find it impossible to accept any such view. The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore, irrelevant; it neither goes to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibili-

ty as a witness. Such questions must, therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because, if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they tend to introduce suspicion as if it were evidence, but they tend to distract the jury from the true issue - namely, whether the prisoner in fact committed the offence on which he is actually standing his trial. It is of the utmost importance for a fair trial that the evidence should be prime facie limited to matters relating to the transaction which forms the subject of the indictment and that any departure from these matters should be stricly confined."

It is important to point out that it does not result from the conclusion that the word "charged" in proviso (f) is otiose: it is clearly not so as regards the prohibition. Lord Sankey, L. C., recognised the possibility of circumstances in which the fact of a charge resulting in an acquittal might be elicited. Among the instances he mentioned was that of a man charged with an offence against the person who might be asked whetherr he had uttered threats against his victim because he was angry with him for having brought an unfounded charge. A further instance is supported by the later case of R v. Waldman[1], in which the Court of Criminal Appeal upheld a conviction for receiving stolen goods although the accused, who had put his character in issue, had been asked about a previous acquittal

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1) (1934) 24 Cr. App. Rep. 204

on an earlier charge of receiving. The court appears to have considered that Maxwell's case could be distinguished because was the question was addressed to a character witness as well as to Waldman, and because the question was linked with one concerning a previous conviction for receiving. The court also recognised the possibility that a previous acquittal of receiving might be relevant to the accused's guilty knowledge on a subsequent occasion because the previous investigation ought to have stimulated the most careful inquiries in the later transactions, and thus militate against the credibility of statements to the effect that the accused acquired goods, cheaply without asking questions concerning their origin.

It has been suggested that the effect of the decision in Maxwell v. Director of Public Prosecutions[1] should be incorporated in any restatement of the law especially as the terminology of proviso (f) appears to suggest that when the accused throws his shield away, any questions about charges in court are permissible, whatever the result of the charge may have been. However it should be emphasised that both Maxwell v. Director of Public Prosecutions and R V Waldman were concerned with situations in which the shield had been thrown away. Anyhow it is extremely doubtful when this is not the case, whether the accused could be asked about a previous charge resulting in an acquittal owing to the restricted phraseology of S. 1 (f) (i)[2]. Quite apart from the rule as to relevance, which applies alike to S. 1 (e) and S. 1 (f) in each of its exceptions it must be noted that

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1) (1935) A.C. 309 2) SS.141 (f) (i) of the 1975 Scotland Act; S.399 (e) (i) of the 1958 Crimes Act (Victoria) S.159 (d) (i) of the Nigeria Evidence Act

the wording of S. 1 (f) (i) expressly excludes any reference to the accused having previously been charged with an offence; only the fact of his having committed or been convicted of such offence is said to be admissible, and indeed, it is obvious that a previous charge, standing alone with an acquittal, cannot have any relevance to a guilt as charged, although it may be relevant to credit. Hence, under S. 1 (f) (i), previous acquittals are not within the proper scope of cross-examination. In R v. Cokar[1], Cokar was convicted at quarter sessions of entering a dwelling-house by night with intent to steal. He had entered the house through a window sometime after midnight and was found by the householder shortly afterwards sitting in a chair in front of the fire. He had apparently made no attempt to steal anything. Cokar was cross-examined to the effect that he knew it was no offence if he was merely found in the premises sleeping; and leave was sought to cross-examine Cokar as to a previous occasion on which he had been found on private premises and had been charged and acquitted. The questions were allowed and Cokar convicted. On appeal to the Court of Criminal Appeal, his conviction was quashed on the ground that the question concerning the previous charge had been wrongly admitted. It was the court's view that the purpose of the cross-examination had been to show that on the occasion of the previous charge Cokar must have learnt that no offence was committed in law by a person who was on premises for an innocent purpose such as sleeping. Whether or not the questions were allowab-

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1) (1960) 2 Q.B. 207; see also R v Wadey (1935) 25 Cr. App. Rep 104; R v Sugarman (1935) 25 Cr. App. R. 109; R v Savory (1942) 29 Cr. App. R. 1

le depended on the true interpretation of S. 1 of the Criminal Evidence Act, 1898, and in particular, of paragraph (f), where there was a complete prohibition on suggestion that a man had been previously charged, whatever the result of the charge. There were three exceptions to this prohibition. Section 1 (f) (ii) and (iii) did not apply to the case because Cokar had neither put his character in issue, nor cast imputation nor given evidence against a co-accused. The question in this case was whether the cross-examination was admissible under the first exception, namely: "Unless the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he has been charged." The exception only dealt with the commission or conviction of other offences and there was no reference to "charge". Accordingly, it was impossible to question a man in regard to a charge of which he had been acquitted under this exception. Thus the cross-examination had been wrongly allowed and the Court of Criminal Appeal rightly quashed the conviction.

In Maxwell v. Director of Public Prosecutions[1], it was decided that it is not sufficient that a particular question relating to one of the matters referred to comes within the terms of an exception unless it is also capable of justification according to the general rules of evidence and, in particular satisfies the test of relevance. In that case the question came within the terms of exception (ii) to S. 1 (f) of the 1898 Act, for the prisoner had set up his good character, but failed to satisfy the common law test of relevance, since "the mere

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1) (1935) A.C. 309

fact of a charge cannot in general be evidence of bad character or be regarded otherwise than as a misfortune". It seems the position in R V Cokar[1] is the reverse. The question would appear to satisfy the test of relevance but not come within the terms of the statutory permission which, in this case, was exception (i). R V Cokar appears to be the first decision on whether cross-examination under exception (i) is confined to the commission or conviction of other offences, and it is respectfully submitted that the Court in R V Cokar adopted the correct construction of the statute. The contrast between the prohibiting words, "committed or been convicted of or been charged with any offence" and the permitting words of exception (i), "committed or been convicted of", seems to indicate a clear intention that there should be no cross-examination as to a mere charge under exception (i).

(5) THE RELATION OF PROVISO (e) TO PROVISO (f) - [1898 Act]

There is at first sight, a conflict between proviso (e) and (f). proviso (e) provides that the accused may be asked "any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged". This provision though restricted by the principle of privilege against self-incrimination helps to preserve the rule that any evidence relevant to guilt as charged is, prima facie, admissableto prove guilt as charged. Proviso (f) provides that he shall not be asked, inter alia, any question tending to show that he has committed or been convicted of any other

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1) (1960) 2 Q.B. 207; (1960) 2 All E.R. 175

offence. Now it is apperent that a question which shows that the accused has committed or been convicted of some other offence may also tend to criminate him as to the offence charged. Proviso (e) apperently allows such a question, proviso (f) apperently forbids it. One or the other must give way.

Somehow, surprisingly, the relation of proviso (e) to proviso (f) for a long time was not discussed until the case of Jones v. Director of Public Prosecutions[1]. In that case, a majority of the House of Lords sanctioned a construction of S. 1 (f) which does much to reduce the practical effect of the difference between the two views concerning the relationship of provisos (e) and (f). This point will be further discussed later. It is however significant to mention that the two main views on the subject expressed in Jones's case were discernible in the earlier authorities. They may be described as the "literal" and "broad" views respectively. According to the literal view proviso (e) permits questions tending to criminate the accused as to the offence charged, while proviso (f) prohibits, subject to exceptions which must be construed literally, questions tending to incriminate the accused indirectly as well as those which simply go to his credit as a witness. This view is supported by: (i)the wording of the statute which excludes previous charges and bad character from the first exception, (2) the tenor of Lord Sankey's speech in Maxwell v. Director of Public Prosecutions and (3) the decision of the Court of Criminal Appeal in R V Cokar[2] where cross-

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1) (1962) A.C. 635; 2) (1960) 2 Q.B. 207

examination about a previous charge was held to have infringed the statute although it related to an issue raised by the accused.

According to the broad view, proviso (e) permits questions which tend to criminate the accused as to the offence charged directly or indirectly, and, in cases to which none of the exceptions apply, the prohobition in proviso (f) relates solely to cross-examination to credit. This view is supported by R v. Chitson[1], R v. J. Kennaway[2], R v. Kurasch[3], and the second of the six propositions with which Lord Simon concluded his speech in Stirland v. Director of Public Prosecutions[4]. In R v. Chitson, the accused was charged with unlawful intercourse with a girl of 14. In the course of her evidence in chief, the prosecutrix stated that he had told her that he had done the same thing to another girl. There was no evidence whether this other girl was beneath or above the age of 16 at the material time, but it was held by the Court of Criminal Appeal that the prisoner had been properly examined with regard to his relations with her because, although the questions did no doubt tend to show that he was of bad character, they also tended to incriminate him as the offence charged; if he had had intercourse with the other girl, that fact would confirm the prosecutix's statement with regard to what he told her. If the other girl had been under 16 at the material time, the case would have come within S. 1 (f) (i) because evidence that Chitson had committed another offence would have been admissable in-chief but, if the other girl was over 16 at the material time, no offence would have been committed against her; nevertheless despite the ommission

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1) (1909) 2 K.B. 945 2) (1917) 1KB 25 3) (1915) 2 K.B. 749
4) (1944) A.C. 315; (1944) 2 All E.R. 13

of the words "bad character" from S. 1 (f) (i) the cross-examination was held to be permissible because it was relevant to an issue in the case. The test therefore, was one of relevance to guilt as charged, and that criterion being satisfied, it was no answer to the cross-examination that evidence also exposed some aspect of the accused's character. In R v. Kennaway[1], on the trial of a prisoner for forgery of a will two accomplices were called for the prosecution, who deposed that the will was forged by the prisoner in pursuance of a scheme by which they were to endeavour fraudulently to obtain an advance from third persons to a legatee under the will on the faith of his legacy. One of the accomplices was to figure as the legatee and the other as the executor. They said that the accused told them that he objected to appearing as executor himself because he had forged a will under a similar scheme in the past, that on that occasion he had played the part of the executor, and that if he did it again suspicion might be directed at him. The prisoner gave evidence to his defence, and denied amongst other things, the accomplices' statement that he had admitted the earlier forgery. In cross-examination counsel for the prosecution went into details of that earlier forgery and asked questions tending to show that the prisoner had infact committed it. It was held by the court that the cross-examination was rightly admitted. If the prisoner had in fact been guilty of a similar forgery in connection with the earlier will, the probability was that the accomplices' story that he told them so

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1) (1917) 1 K.B. 25

and gave that as his reason for not being executor under the later will was true, and therefore the answers to the questions might afford corroboration of their evidence. The cross-examination was consequently relevant to the issue at the trial, and was not open to objection under the Criminal Evidence Act, 1898.

And in R v. Kurasch[1], the appellant and four other men were tried and convicted of conspiring by means of false pretences to defraud the prosecutor, the false pretences alleged being the holding of a mock auction. The defendants denied the false pretences and also alleged that they were all merely the servants of a woman who was the proprietress of the auction business. Evidence was given for the prosecution that the appellant had said at the time of his arrest that one of the other defendants was employed by him. The appellant gave evidence and was asked in cross-examination whether it was not the fact that he and the proprietress of the business were at the date of the offence living together as man and wife. The appellant answered the question in the affirmative. The appellant appealed against his conviction on the ground that this question was a contravention of the Criminal Evidence Act, 1898, S. 1 (f), in that it tended to show that he was a person of bad character. It was held, that, the defence having raised the issue that the defendants were only the servants of the proprietress of the business, it was material to show what were the real relations existing between her and the appellant, and that the question was therefore admissible. It is no doubt clear that the accused had done nothing to throw his shield

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1) (1915) 2 K.B. 749

away under S. 1(f)(ii) or (iii), and, as the question merely tended to show immorality as opposed to the commission or conviction of another offence, the case fell outside the literal words of S. 1(f)(i).

As earlier mentioned, Lord Simon's second proposition in Stirland v. Director of Public Prosecutions[1], favours the braod view as the basis for the admissibility of questions in cross-examinations notwithstanding their apparent infringement of the prohibition contained in proviso (f), for the proposition asserts that the accused may be examined: "as to any of the evidence he has given in-chief including statements as to his good record with a view to testing his veracity or accuracy or to showing that he ought not to be believed on his oath".

After a total difference of judicial opinion on the fundamental question of the relation between paragraph (e) and (f) of the 1898 Act, it was eventually discussed in Jones v. Director of Public Prosecutions[2]. The majority of the House of Lords (Viscount Simonds, Lord Reid and Lord Morris of Borth-y-Gest) held that paragraph (e) allows only questions tending directly to criminate the accused as to the offence charged, and not questions tending to do so indirectly such as questions about other misconduct of which evidence was admissible at common law. That is to say, the question must relate directly to the offence charged, and it is not enough that the other misconduct would have been admissible during the case for the prose-

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1) (1944) A.C. 315; (1944) 2 All E.R. 13 2) (1962) A.C. 635; (1962) 1 All E.R. 569

cution. On this view paragraph (f) allows questions which tend indirectly to criminate the accused as to the offence charged, and questions directed to his credibility as a witness, only if the case falls within one of the three exceptions in paragraph (f). The minority (Lord Denning and Lord Devlin) considered that paragraph (e) allowed questions tending, whether directly or indirectly, to criminate the accused as to the offence charged and that paragraph (f) related only to questions directed to the credibility of the accused as a witness.

The Criminal Law Revision Committee said that "on the question of the relation between paragraphs (e) and (f) we have no doubt that the minority view gives the right result. We therefore propose that the accused, if he gives evidence, should be open to cross-examination about any misconduct of which evidence would have been admissible (in particular, under clause 3 - of the Committee's Draft Bill, which makes provision as to the admissibility of other conduct of the accused tending to show disposition -) during the case for the prosecution"[1]. The committee's proposal as to the relation between the two provisos is supported by the Bar Council[2].

It is equally significant to point out that the majority's view in Jones's case that "tending to show" means "make known" or "reveal" to the jury has gone a long way towards reducing the practical effect of the difference between the literal and broad views concerning the relation between provisos (e) and (f) of the Criminal Evidence Act 1898, if it applies to cases in which the evidence tending to show

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1) CLCR at S 117 2) BC S 128; cf C Tapper (1973) 36 M.L.R. 167 at pp. 168-169

bad character has been given by the prosecution. In Jones v. Director of Public Prosecutions, the speeches of the majority disapprove, obiter, of the rationes decidendi of R v. Chitson[1], R v. Kennaway[2], and may be by implication R v. Kurasch[3]. Lord Reid in his judgement observed as follows: "It is said that the views which I have expressed involve overruling two decisions of the Court of Criminal Appeal, R V Chitson and R V Kennaway. I do not think so. I think the decisions were right but the reasons given for them were not. In the former case, the accused was charged with having had carnal knowledge of a girl of 14. Giving evidence, she said that the accused told her he had previously done the same thing to another girl, who, she said was under 16. No objection was taken to this evidence, I assume rightly. So before the accused gave evidence the jury already knew that he was alleged to have committed another offence. If the views which I have already expressed are right, cross-examining the accused about this matter disclosed nothing new to them and therefore did not offend against the prohibition in proviso (f). But the judgement of the Court was not based on that ground: it was said that although the question tended to prove that the accused was of bad character they also tended to show that he was guilty of the offences with which he was charged. For the reasons I have given I do not think that that is sufficient to avoid the prohibition in proviso (f). R v. Kennaway was a prosecution for forgery. Accomplices giving evidence for the prosecution described

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1) (1909) 2 K.B. 945 2) (1917) 1 K.B. 25 3) (1915) 2 K.B. 749

the fraudulent scheme of which the forgery was a part and related a conversation with the accused in which he stated to them that some years earlier he had forged another will in pursuance of a similar scheme. Then in cross-examination the accused was asked a number of questions about this other forgery. Those questions were held to have been properly put to him. Here again, these questions disclosed nothing new to the jury and I can see no valid objection to them. But again that was be the ground of the court's decision. Their ground of decision was similar to that in Chitson's case, and I need not repeat what I have said about that case"[1]. However it is thought that Lords Devlin and Denning would have decided Chitson's case as it was decided for the reason given by the Court of Criminal Appeal, namely, that the cross-examination was relevant to an issue in the case and did not merely go to credit[2]. There are, however, many situations in which cross-examination must be rejected according to the majority opinion in Jones v. Director of Public Prosecutions although it would be admissible according to the broad view. For example, the questions concerning the accused's relations with the proprietress of the auction room upheld by the Court of Criminal Appeal in R v. Kurasch[3] would be condemned on the reasoning of the majority of the House of Lords in Jones's case because there had been no previous suggestion to the jury that the proprietress was the accused's mistress. On this view the question would have been prohibited by S. 1 (f) and not permitted by S. 1 (e), but the question was perfectly proper according to the opinions of Lord Denning and Lord

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1) (1962) A.C. 635 at 665 of per Lord Morris another member of the majority at p.685 Ibid 2) See too R v Donnini (1972) 128 C.L.R. 114 at 130 where Menzies J. disposed of the appeal in a similar manner.
3) (1915) 2 K.B. 749

Devlin.

And as earlier mentioned, Lord Denning viewed with concern the suggestion that Chitson and Kennaway were wrong for they have governed the practice in the criminal courts for years with, in his view, wholly beneficial results. Lord Devlin also favoured upholding these cases even if they were incompatible with a strict construction of the section: "If mistakes have been made, if the correct thing has not always been done, but if the result produced is a sensible one that has established itself in the practice of the law, let it be left alone". The status of the principle applied in these three decisions is not therefore easy to state categorically. The disapproval of the majority, being obiter, is not strictly binding on lower courts and is weakened by the dissent of Lords Denning and Devlin. However, the decision of the Court of Criminal Appeal in Rv. Cokar[1] seems to be inconsistent with the principle on which the three earlier cases were decided. In the result, then, it would seem that they must be regarded as of very doubtful authority. The effect of this is somewhat mitigated by the fact that the cross-examination in those cases would now be allowed under the principle which was the ratio decidendi of the majority in Jones v. Director of Public Prosecutions[2]. But in a case where the evidence had not been led by the prosecution nor given by the accused in his cross-examination-in-chief, such cross-examination would now be ruled out.

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1) (1960) 2 Q.B. 207 2) (1962) A.C. 635; (1962) 1 All E.R. 569

(6) THE INTERPRETATION OF S. 1 (f) (i)[1]

"A person charged .... shall not be asked ... unless:-

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged;".

It is worthy of note, that unlike exceptions (ii) and (iii) S.1 (f) (i) operates as a matter of law, because of the relevance and admissibility of the evidence, and requires no step to be taken by the defence to bring it into play. The section allows the accused to be questioned concerning other offences when proof that he has committed or been convicted of them is admissible to show that he is guilty of the offence charged. Although there is a dearth of authority on the point, there can be little doubt that S. 1 (f) (i) permits cross-examination about previous convictions when they have been proved in-chief on the rare occasions on which such a course is permissible. There can also be little doubt that, when similar fact evidence has been given in-chief because it does more than show bad disposition, the accused may be cross-examined about the other offences mentioned in such evidence[2]. The principle of Makin v. Attorney General for New South Wales[3], earlier discussed, under which evidence of misconduct on another occasions is inadmissible if its only relevance is to support an argument that the accused is the kind of man who would commit the crime charged, applies just as much to evidence elicited in cross-examination as to evidence-in-chief[4].

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1) SS. 141(f)(i) and 346(f)(i) of the 1975 Scotland Act; S.399(e)(i) of the 1958 Crimes Act (Victoria); S.159(d)(i) N.E.A. 2) R v Chitson (1909) 2 K.B. 945; R v Kennaway (1917) IK.B. 25 (These cases must now be read subject to the majority views in Jones's case); see also R v Cokar (1960) 2 Q.B. 593 3) (1894) A.C.57 4) See per Lord Devlin in Jones v. Director of Public Prosecutions (1962) A.C. 635 at 701; (1962) 1 All E.R. at p.593

Therefore questions suggesting that the accused has been convicted of or has committed other offences which have not been proved in-chief would normally be inadmissible, but, if they are relevant for some further reason than their tendency to show bad disposition, they may be permissible under S.1(f)(i) although they do not relate to matters proved in chief. In general they will, however, be inadmissable, because a proper foundation should have been laid for the cross-examination by means of the evidence-in-chief. It was said in Jones v. Director of Public Prosecutions[1] that when the accused has committed or been convicted of another offence is justified in proviso (f)(i), it is in general undesirable that it should be first adduced in cross-examination. Lord Denning observed as follows: "Before any cross-examination is permissible under exception (i), the prosecution must lay a proper foundation for it by showing some 'other offence which is admissible evidence to show that he is guilty'. The prosecution should normally do it by giving evidence in the course of their case; though there may be cases in which they might, with the leave of the judge, do it for the first time in cross-examination"[2].

And in a similar vein Lord Morris of Both-y-Gest said: "If the prosecution consider that proof of the commission or the conviction of some other offence would be 'admissible evidence' to show guilt in regard to the offence charged (eg. within the principle laid down in the case of Makin v. Attorney General for New South Wales) then such proof from the points of view of effectiveness and convenience would be given, if allowed as admissible, as part of the case for the

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1) (1962) A.C. 635, (C.C.A.) at 646) 2) (1962) A.C. 635 at 668

prosecution. I agree with the Court of Criminal Appeal that in general it would be undesirable if the matter was first raised in cross-examination"[1]. It is pertinent to draw attention to the Australian case of R v. May[2], where the accused in evidence-in-chief stated that he had falsely admitted to the police that he was to blame for an alleged offence and took the blame for another because as he said: "I have never had much trouble". The Crown secured leave to put a number of previous convictions to the accused under S. 399 (e) (i) [of the 1958 Act (Victoria) - which is the equivalent of S, 1 (f) (i) -] on the ground that these were relevant on the question of the truth or falsity of the accused explanation.

In R v.Cokar[3], the Court of Criminal Appeal was clearly of opinion that no question concerning a previous charge other than one which was merely a preliminary to an admissible question concerning a conviction could be put under S. 1 (f) (i) and, in Jones v. Director of Public Prosecutions[4], the majority would clearly not have allowed a question tending to show bad character if the bad character had not previously been revealed to the jury. It may therefore be taken to be settled English law that S. 1 (f) (i) must be construed literally, and no words justifying questions about charges or bad character can be read into it.

The Australian courts have consistently favoured a broad interpretation of the prohibition and S. 399 (e) (i) - [which is an equivalent to S. 1 (f) (i)]. The basis of most of their decisions

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1) Ibid at 685 2) (1959) V.R. 683 3) (1960) 2 Q.B. 207; (1960) 2 All E.R. 175 4) (1962) A.C. 635; (1962) 1 All E.R. 569

seems to be that the draftsman inadvertently omitted to mention questions showing bad character in S. 399 (e) (i). In Attwood v. R[1], the court held that the words of the prohibition in S. 399 (e) do not exclude questions on matters relevant to the proof of the charge, because those questions also possess a tendency to show the accused to be of bad character. To quote the judgement of the High Court on the point, they said: "One argument is to be found in sub-paragraph (i) of paragraph (e) of S. 399 [of Victoria Crimes Act, 1958]. Why, it is naturally asked should the express provision be made in favour of allowing questions as to the commission of offences and convictions of offences where relevant if without any provision expressly permitting it the accused as a witness may be asked questions simply because they are relevant to proof of the ingredients of the crime, notwithstanding that the do affect his character? The reason is, one may reasonably suppose, that the draftsman saw the two things in different lights. When he expressly prohibited proof of thee commission of an offence or of a conviction of an offence the draftsman said that he was expressly prohibiting proof of a fact he definitely identified independently of its operation or of the ground of introducing it in evidence. On the otherhand, in the case of 'questions tending to show that he (the accused) is of bad character' the draftsman was dealing with a description of cross-examination going to credit which he thought of as, ex hypothesis, outside the field of relevancy altogether. In other words, in the case of strictly relevant facts he was regarding them as open to proof as part of the

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1) (1960) 102 C.L.R. 353 at 361; (1960) A.L.R. 321 at 325

Crown case and as necessarily, or at least as naturally, the subject of evidence by the accused if he were called as a witness on his trial and he regarded them as not matter going to the bad character of the accused but as a matter going to proof of his guilt. The words describe questions as to that kind of evidence excluded at Common Law upon the trial of criminal issues as a matter of policy but allowable in the cross-examination to credit of an ordinary witness. It follows that in so far as the questions excepted to in the present applicant were relevant to the issues they were not excluded by the operation of S. 399 (e)". It was also observed by the court that: "The exclusionary words in S. 399 (e) do not naturally relate to a fact, matter or circumstance which is, in itself relevant to the prrof of the issues although its occurence or existence incidentally tells against the possession by the accused of a good character or may be the ground attributing to him a bad character. This view was expressed by Angus Parsons J. in the Supreme Court of South Australia speaking for the full Court, His Honour said of the cross-examination there objected to: "Such questions are not directed as to the accused bad character, but to prove his guilty knowledge, which was one of the issues in the case, and, that being the position, they were not rendered inadmissible by reason of the fact that they might also tend to show that he was of bad character"[1]. In R v. Lambert[2], Piper A. J. speaking for the Full Court adopted this statement and also said, 'notwithstanding that it ap-

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1) R v Baxter (1927) S.A.S.R. 321 at 327 2) (1957) S.A.S.R. 341

pears that the provisoes' (to the provision) 'were enacted in order to protect accused persons from such prejudicial effect as might arise from the consequences of enacting that accused person may give evidence in their own defence, questions which tend to show that he is of bad character may be asked of an accused person if they are relevant to the question whether he did or did not commit the offence charged'[1]. His Honour added: 'or to test the veracity of evidence in-chief'[2], but it is safer to omit this alternative as capable of a construction or application which would carry it beyond relevance into cross-examination to credit. Otherwise the passage expresses the interpretation of the provision which seems best to accord with the probable legislative intention."[3]

It is pertinent to point out that the view that S. 1 (f) and its equivalent does not prohibit questions tending to show bad character and (presumably) questions tending to show charges, can be reached in three ways; (a) that of Lord Denning and Jones's case, according to which there may always be cross-examination on matters relevant to the issue, (b) that of Lord Devlin in Jones's case according to which 'character' in S. 1 (f) means 'reputation' so that questions about specific acts falling short of an offence are outside the prohibition, and (c) the way adopted by the High Court in Attwood's case according to which the questions are casus omissus and words may be read into S. 1 (f) (i) and its equivalents.

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1) Ibid at 345-6 2) Ibid at 346 3) (1960) 102 C.L.R. 353 at 361; see also R v May (1959) V.R. 683

(7) THE INTERPRETATION OF SECTION 1 (F) (ii)[1]

An accused person shall not be asked ... unless - (ii) "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

In order to have an analytical examination of the above section, and also for a proper understanding of the provisions, it will be better to divide the discussion of Section 1 (f) (ii) into two main parts - viz - cases in which the accused puts his character in issue, and those in which the nature or conduct of the defence involves imputations on the character of the prosecutor or one of his witnes ses.

(i) Character in Issue

To bring the first limb of the second exception to the prohibiton into play, the court must be satisfied that the accused: "has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character". Thus it is envisaged that the defendant may attempt to establish his good charcater by either of the two methods described in the section, or both together; in any such case, the shield is lost, the accused having effectively put his

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1) SS.141(f)(i) and 346(f)(ii) of the 1975 Scotland Act; S.399(e)(ii) of the 1958 Crimes Act (Victoria); S.159(d)(ii) Nigerian Evidence Act

character in issue.

In Scotland, the first part of paragraph (f) (ii) as its English counterpart permits cross-examination of "the accused or his councel or solicitor has asked questions of the witnesses for the prosecution with a view to establish the accused's good character, or the accused has given evidence of his own good character."[1] Except for the alteration of a few words the provisions in Scotland and England are substantially the same. However, Sherrif Macphail[2] is of the view that the phraseology of the first limb as set above, does not in terms cover the case where the accused has led evidence of witnesses to his good character but does not cross-examine on the subject or allude to it in his own evidence in chief: such witnesses may be cross-examined as to his character, but he himself may not. Sherrif Macphail then suggests that the phraseology should be recast in order to cover such a case, and that it should be made possible for the accused to be recalled for the cross-examination as to character, by a co-accused as well as the prosecutor, after such witnesses have given evidence. It is significant and interesting to note that in England, the same provision is understood to cover such a case as Cross stated: "The latter phrase is apt to cover a case in which the prisoner calls a witness to character but does not cross-examine on the subject or allude to it in his own evidence in chief"[3]. May I just say that I find the view expressed by Cross more appealing and the suggestion by Sherrif Macphail for the provision to be remodelled might be unnecessary after all. My reason for following Cross' view

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1) SS.141 (f)(ii) and 346(f)(ii) 1975 Scotland Act 2) Sheriff Macphail - Research Paper on the Law of Evidence in Scotland - §5:52 3) Cross on Evidence, 5th ed. at p. 425

is simply because to my mind it is a quite reasonable interpretation of the provision and moreover it is not everytime as Sherrif Macphail might prefer to see as a result of his suggestion that the intentions or all the intentions of a statutory provision are made crystal clear by the legal draughtsman. However the other suggestion made by Sherrif Macphail to the effect that it should be made possible for the accused to be recalled for cross-examination as to character, by a co-accused as well as the prosecutor, after such witnesses have given evidence, is an important point to take notice of. And in Australia the same provision of the first limb to Section 1 (f) (ii) seems to extend further than that claimed in England as it is probably thought to cover the rare case where an accused gives sworn evidence after putting forward his own good character during his unsworn statement[1], though not apparently during his address to the jury from the dock[2].

The first limb of the second exeption to the prohibition is not brought into play when a defence witness volunteers a statement concerning the haracter of the accused which he had not been asked to make as R v. Redd[3] demonstrates. In that case, an appellant, who was tried for housebreaking and robbery, called a witness for the purpose of producing certain letters. This witness, without any question being put to him by the appellant, voluntarily made a statement as to the appellant's good character. The counsel for the prosecution then claimed that as evidence of the appellant's good

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1) R v Gibson (1929) 30 SR (NSW) 282 - This decision is the subject of considerable criticism in MacDonald v R (1935) 52 CLR 739 2)Carroll v. R (1964) Tas SR 76; R v Lockard (1968) Tas SR 195 3) (1923) 1 K.B. 104

character had been given he was entitled to cross-examine the witness as to the appellant's real character, and he thereupon proceeded to ask the witness as to the number of times the appellant had been convicted. The court held that the appellant was not under the circumstances endeavouring to establish a good character by calling witnesses who voluntarily made a statement as to the appellant's good character, and that therefore the questions as to the appellant's previous convictions were not admissible.

Similarly, the exception is not brought into play by the accused's reference to one of his many previous convictions as a ground for fearing the police because it would be wrong to infer that he meant that the occasion of the conviction was the only occasion on which he had previously been in trouble. And the case directly in point is that of R v. Thompson[1]. Thompson was convicted on two counts of office-breaking and larceny and one of taking and driving away a motor vehicle. Some time after the commission of the offences he struck at a policeman who tried to arrest him and ran away: he said he did so because he thought he was being arrested for non-payment of a fine imposed on a conviction for assualt. The judge said that the whole of his character must be laid before the jury and the prosecution may cross-examine him as to his other convictions. It was then elicited from Thompson that he had convictions for violence, taking away motor vehicles and one for dishonesty. It was held, allowing the appeal , that Thompson had not put his character in issue but merely explained his conduct. He had not in any way misled the

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1) (1966) 1 All E.R. 505

court, or sought to assert his charcater as such, and it was wrong of the trial judge to compel him to say for what offence he had been fined, and to allow cross-examination concerning his previous convictions. The dictum of Oliver, J., in R v. Wattam[1], was clearly applied in the above case. In Wattam's case, the appellant who had told a number of lies to the police when questioned about his movements on the day of a murder, on his trial for murder, gave in evidence as his explanation of those lies that he had been in Borstal and had been stealing property in London. The Court held that the appellant had in no sense given evidence of good character, so as to entitle the prosecution to cross-examine him, under Section 1 (f) of the Criminal Evidence Act, 1898, with a view to suggesting bad character. In his judgement, Oliver, J., said: "All he (the accused) had said was: 'I have been in Borstal. I am a thief and I have been stealing things in London. That is why I made certain answers to the police.' That is not, in our view, giving evidence of good character, nor do we agree in the argument ... that the position is to be compared with that of the man who says in the witness-box: 'I have once been convicted of crime', when in fact he has been convicted half a dozen times. A prisoner who says that is, of course, liable to be asked in cross-examination: 'It is not true that you have only been convicted once. Have you not been convicted six times?' because he is giving evidence of a form of good character and is saying untruly: 'My character is better than it truly is'. He

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1) (1952) 36 Cr. App. Rep. 72 at 78

lays himself open under the Act to cross-examination about anything which tends to show that he is a man of bad character. In this case we do not think that .... as he had not put his character in issue, the appellant was not liable to be asked those questions."[1]

It is however submitted that where any creditable attributes are of direct relevance to the defence, apart from any assertation of good character, the defendant would not be within the scope of the exception. Thus, if a prisoner charged with going equipped for a burglary or theft, sought to explain his possession of certain implements by reference to his trade as a builder, it is submitted that he would not thereby "give evidence of his good character" for this purpose, though if he went on to say that he earned his living honestly by building and had no inclination to steal, he would have exceeded his necessary assertion of his defence and put his character in issue. Similarly, it has been held that a general examination by the accused in the course of his evidence into the circumstances surrounding the alleged crime with a view to establishing innocence does not expose him to cross-examination under Section 1 (f) (ii). Sub-clause (ii) of clause (f), Section 1 of the Criminal Evidence Act, 1898, is intended to apply to cases where witnesses to character are called, or where evidence of the good character of the prisoner is sought to be elicited from the witnesses for the prosecution. It is to this class of evidence that the statute refers, not to mere assertations of innocence or repudiation of guilt on the part of the prisoner, nor to reasons given by him for such assertions or repudiations. In R v.

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1) (1952) 36 Cr. App. Rep. 72 at 78

Ellis[1], the appellant was convicted upon an indictment for obtaining from D. cheques by false pretences. The indictment alleged that he sold various artciles of virtu to D. under an agreement that he was to charge D. the cost price plus 10 per cent profit; that the appellant represented to D. that the cost was much in excess of the real cost; and that by this means he had obtained from D. much larger sums than he was entitled to. The appellant gave evidence on his own behalf, and in cross-examination, questions were put to him suggesting that in other transactions he had obtained money from D. by alleging that certain china figures were genuine pieces of Old Dresden China, whereas he knew they were not. The court held that the alleged false pretences in representing the articles to be genuine Old Dresden China when they were not so were entirely distinct from those with which the prisoner was charged, and that, as upon that ground evidence of the false representations with regard to the articles being genuine Old Dresden China was not admissible to show that he was guilty of the false pretences with which he was charged, the questions put were improperly allowed in as much as they tended to show that the appellant had committed an offence other than that with which he was charged, and the conviction must be quashed, as the jury must have been influenced by the questions and answers. In a case like this, no doubt the accused must have in answering the questions about his conduct towards the alleged victim, with a view of negativing any intent to defraud, given explanations with a tende-

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1) (1910) 2 K.B. 746

ncy to establishing good character, but an assertion of innocence might equally well be said to be tantamount to giving evidence of character[1]. In R v. Lee[2] part of the defence was that two men, who were not witnesses at the trial, had had the opportunity to commit the offence in question. Two prosecution witnesses were cross-examined about the men having access to the house, and their previous convictions for dishonesty. The Court of Appeal held that the accused was wrongly cross-examined on his own convictions: "It is not implicit in an accusation of dishonesty that the accused himself is an honest man". It seems that there is a temptation to argue in the present case that the attack on the character of the third parties was an implicit assertion of the accused's own good character. To my mind however, the accused was merely suggesting that, because of their bad character, they were persons likely to have committed the offence. If he had said explicitly, "they are more likely to have committed the offence than I because they have bad characters", this would indeed seem to amount to an assertion that his own character was good. However it does not appear that he went so far. The accused may clearly submit with an impunity that third persons, not witnesses, had the opportunity to commit the offence. This is in itself a suggestion that they may have done so - otherwise there is no point in it. To show that they had not only the opportunity but also the propensity to commit the offence seems to differ only in degree and not in principle. In Butterwasser's case[3] Lord Goddard, C. J., said " ... by attacking the witnesses for the prosecution and

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1) See R v Crawford (1965) VR 580; R v Mathews (1973) WAR 110; R v Langford (1974) Qd R. 67 2) (1976) 1 All E.R. 570; (1976) 1 W.L.R. 71
3) (1948) 1 K.B. 4

suggesting they are unreliable [the accused] is not putting his character in issue; he is putting their character in issue." The same must apply when the accused attacks the character of third parties who are not witnesses which is why I support the decision in R v. Lee.

And in Donnini v. R[1] two judges of the majority of the High Court in Australia held that if a question is asked of the prosecution witness with a view to establishing accused's character, that is enough: it seems immaterial that the witness answers in barely relevant terms that accused is "quite shy" and "always very pleasant".

However, what amounts to an assertion of good character may not always be easy to determine. At any rate we do not know generally speaking that the accused's own evidence of his character takes the form of allusions to his innocent or praise worthy past. Therefore it may be assumed that the rule will cover any evidence adduced by the defence which is not otherwise relevant to the issue of guilt and which in fact has the effect of inviting the jury to infer that the defendant is a man less likely, from whatever consideration of character, to have committed the offence charged than would otherwise have appeared to them to be in the case. The most obvious case is where the defendant asserts that he has no previous convictions, or that he is a man above suspicion or of good moral character, in whatever terms, or that the offence charged is contrary to his disposition. But the assertion may be less direct; for example a man's

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1) (1972) 128 C.L.R. 114; See also R v May(1959) V.R. cf Lowery v. R (1974) A.C. 85, 102 (PC) - Evidence from a physchiatrist as to the intelligence and personality of an accused is not evidence about his character

allegations concerning his regular attendances at Mass or that he is a religious person[1], his assertion that he has been earning an honest living for a considerable time[2], and his affirmative answer to the question whether he is a married man with a family in regular work[3], have been treated as instances in which the shield provided by Sec-.tion 1 (f)[4] would be thrown away. Other similar instances would include claim by a person that he is a membber of a generally respected profession, institution, society or club. Presumably this may be impliedly asserted by appearance or dress, for example a school tie. It is a moot and interesting question how far a defendant may safely appear respectably or tidily dressed in court, without risking making an implied assertion of good character. Occassionally, the appellate courts have had to intervene to prevent absurd results, as in R v. Hamilton[5], where the trial judge wrongly ordered the defendant to remove his regimental blazer before giving evidence. Hamilton was convicted of indecent assault. He appealed on the ground that the number and nature of the interventions by the judge were such that the conviction should be quashed. He also complained that the judge, in the absence of the jury, obliged him to remove a regimental blazer he was wearing on the ground that it might be considered evidence of good character. The court held, dismissing the appeal, that it is wrong for a judge to descend into the arena and give the impression of acting as advocate and often does more harm than good. However whether interventions can give ground for quashing a conviction is not only a matter of degree but also depends on what the interven-

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1) R v Ferguson (1909) 2 Cr. App. Rep. 250 2) R v Baker (1912) 7 Cr. App. Rep. 252 3) R v Coulman (1927) 20 Cr. App. Rep. 106 per Swift J., in the course of the argument 4) See SS 141(f) 1975 Scotland Act; S. 399 (e) 1958 Crimes Act (Victoria); S. 159(d) Nigerian Evidence Act; 5) (1969) Cr. L.R. 486

tions are directed to and what their effect may be. Interventions to clear up ambiguities and to enable the judge to make an accurate note are perfectly justified. Interventions which may lead to the quashing of a conviction are (1) those which invite the jury to disbelieve the defence evidence in such terms that it cannot be cured by telling the jury that the facts are for them; (2) those which make it impossible for counsel to present the defence properly; (3) those which have the effect of preventing the defendant from doing himself justice and telling his story in his own way.

In the present case though the judge descended into the arena he did not do so to an excessive degree, counsel was not prevented from presenting the defence and Hamilton did himself full justice. The judge was not justified in forcing Hamilton to remove his blazer but this could have had no effect on the result of the trial. There are some important things to be said by way of comment about this case. First, it should be clearly reiterated that whether or not the accused goes into the witness-box, he is allowed to adduce evidence of his own good character. There seems to be no good reason why an accused should not impliedly assert his good character by wearing clothes which suggest this. The prosecution could no doubt, in an appropriate case, adduce evidence to rebut the implied assertion of good character, though it is likely that the judge would exercise his discretion against admitting such rebutting evidence in most cases, since the wearing of certain types of clothing may not amount to a

very powerful assertion of good character, and it might be oppressive to allow the prosecution to adduce strong rebutting evidence. It is not clear whether if the accused were to give sworn evidence he could be cross-examined on his record on the basis that he had, by wearing a uniform, thrown away his "shield" under Section 1 (f) of the Criminal Evidence Act, 1898. It seems doubtful whether it could be said that he had "given evidence of his own good character" within the meaning of Section 1 (f) (ii). However even if it were possible to cross-examine on this basis, the judge would still have an overriding discretion.

By and large claims by an accused person that he has attributes which people would be likely to think creditable come within the meaning of Section 1 (f) (ii) and the decisions certainly do not indicate any great reluctance on the part of the courts to hold that he has put his character in issue by such a reference.

In a Victorian Health Act prosecution the statement by the defendant "I always take every precaution" was held to amount to evidence of good charcater as applied to the trade in question[1]. But there seems to be some doubt whether a reference to honourable discharge from the army would have this effect. In R v. Parker[2] it was held that a mere reference to a meritorious discharge from the army by an undefended prisoner in a statement handed to the court of trial does not necessarily expose him to cross-examination on his character generally (though it may do so on his career in the army). The ratio of this case appears to be that if the accused does not plead an

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1) Gunner v Payne (1910) VLR 45
2) (1924) 18 Cr. App. Rep. 14

aspect of his life as his general character, he cannot be so cross-examined, but if he does then he may be cross-examined as to his general character. I think attention should be payed to the phrase used in the decision - " ... does not necessarily expose him ...". Similar uncertainty prevails with regard to the statement by a man charged with traffic offences that he disapproved of speeding[1]. And in R v. Samuel[2], Samuel was convicted of larceny by finding. The facts, shortly, were that a camera, which had been lost some five weeks earlier by a little girl in the grounds of a museum, had been found in Samuel's possession. Samuel said at the trial that he had intended returning the camera, and gave evidence that on two previous occasions he had found property belonging to someone else and had handed it back. The chairman ruled that, in these circumstances, the accused had put his character in issue, and accordingly, Samuel was cross-examined as to his previous convictions. Samuel appealed to the Court of Criminal Appeal against his conviction on the main ground that cross-examination as to previous convictions was improperly allowed. It was contended that the evidence given by Samuel about handing back other property was not evidence of "good character" within the meaning of Section 1 of the Criminal Evidence Act, 1898, and that "character" in that context meant general good character and reputation. The court held, dismissing the appeal, that the only effect of the evidence by Samuel could have been to induce the jury to say that when Samuel found property he gave it up, or, in

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1) R v Beecham (1921) 3 K.B. 464
2) (1956) 40 Cr. App. Rep. 8

other words, that he was an honest man. That entitled the prosecution to show that there were other occasions when Samuel had not dealt honestly with property. The simple issue was: Did the appellant put his character in issue? In the opinion of the Court, he clearly had.

So much has been said and discussed about the issues and problems especially from the corner of the defence that a few final points on issues from the corner of the prosecution will be appropriate. In the first place it is helpful to note that whether a question put to a person charged with a crime and called as a witness tends to show, within the meaning of Section 1 clause (f) of the Criminal Evidence Act, 1898, that he has committed or been convicted of or charged with any offence other than that with which he is then charged cannot be decided by looking merely at the single question. Each question must be judged by the light of others asked before and after. Secondly, the object of the enactment is that it should not, except in specified circumstances, be suggested to the minds of the jury by means of any question put to the prisoner that he has committed another offence. Any question or series of questions which would reasonably lead a jury to believe that he had committed another offence would tend to show that the prisoner had committed that other offence. If a question does so tend, it is quite immaterial whether it would be admissible on other grounds. It is the duty of the judge not to wait for any objection to the question from the prisoner's counsel, but to stop the question himself, and to direct the jury to

disregard it and not allow it to influence their minds.

It is now necessary to consider some vital issues like the meaning of "character" as used in Section 1 (f) in general and the first part of Section 1 (f) (ii) in particular, the purpose of cross-examination under the exception and the question of the divisibility of the accused's character.

(ii) THE MEANING OF CHARACTER

We have already discussed the definition of the term 'character' which in ordinary language may mean either the reputation or the disposition of the person about whom the inquiry is being made, and that, at common law a character witness might only be asked about the reputation of the accused. It is easily noticed that the word "character" is used no less than four times in proviso (f) of Section 1 of the Criminal Evidence Act, 1898[1]. And there has been much speculation about the meaning Parliament intended to give the word when enacting the 1898 Act. It is variously argued that Parliament intended either to maintain the narrow definition, insisted upon in R v. Rowton[2], of general reputation only, or, by the reference to previous specific incidents, to open up the subject of character to a more comprehensive definition. Whatever Parliament actually intended, it is now settled that the word has acquired a wide connotation, for the purposes of the Act and that the disposition of an accused is included in his "character" for this purpose. In R v. Dunkley[3], the appellant was convicted stealing and receiving certain

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1) S.159(d) Nigerian Evid. Act; S. 399(e) 1958 Crimes Act (Victoria); SS.141(f) & 346(f) 1975 Scotland Act; 2) (1865) Le & Ca. 520 3) (1927) 1 K.B. 323

property. A witness for the prosecution gave evidnce that the appellant brought the articles to her and asked her to dispose of them. In cross-examination it was suggested to the witness that her story was a pure invention fabricated out of a feeling of revenge against the appellant. The trial judge allowed the prosecution to cross-examine the appellant as to his previous convictions on the ground that he had cast imputations upon the character of a witness for the prosecution within Section 1 (f) (ii) of the Criminal Evidence Act 1898. Lord Hewart C. J., delivering the judgement of the Court, referred to Section 1 (f) of the Criminal Evidence Act and continued:- "It is apparent that within the space of a very few lines the word 'character' is used in this part of the section no fewer than four times. It is also apparent that the imputations which are spoken of in the closing words of the passage I have read are described, not as imputations on the prosecutor or the witnesses for the prosecution, but as imputations on the character of the prosecutor or the witnesses for the prosecution. In those circumstances it is not difficult to suppose that a formidable argument might have been raised on the phrasing of this statute, that the character which is spoken of is the character which is so well known in the vocabulary of the criminal law - namely, the general reputation of the person referred to; in other words, that 'character' in that context and in every part of it, in the last part no less than in the first, in the third part no less than in the second, bears the meaning which the term 'character' was held to

bear, for example, in the case of R v. Rowton[1], where the question was considered by the Court of Crown Cases Reserved .... Nevertheless, when one looks at the long line of cases beginning very shortly after the passing of the Criminal Evidence Act, 1898, it does not appear that that argument has ever been so much as formulated. It was formulated yesterday. One can only say that it is now much too late in the day even to consider that argument, because that argument could not now prevail without the revision, and indeed to a great extent the overthrow of a very long series of decisions."[2]

And when speaking of the first part of Section 1 (f) (ii) in Stirland v. Director of Public Prosecutions[3], Lord Simon, L. C., said:- "There is perhaps some vagueness in the use of the term "good character" in this connection. Does it refer to the good reputation which a man may bear in his own circle, or does it refer to the man's real disposition as distinct from what his friends and neighbours may think of him." His Lordship was inclined to think that both conceptions were combined in S. 1 (f). This view has since been adopted in the Privy Council [4], and the House of Lords[5], and is implicit in the Australian High Court judgement in Attwood v. R[6] where it was said that "the expression 'bad character' in relation to a witness has no technical or legal meaning."

However in Jones v. Director of Public Prosecutions[7] Lord Devlin[8] discussed a radical change in the construction of the Act, which would in some ways obviate some of the difficulties usually faced but

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1) (1865) Le & Ca. 520; 2) (1927) I K.B. 323 at 329 3) (1944) A.C. 315 at 324; (1924) 2 All E.R. 13 at 17 4) Malindi v R (1967) A.C. 439 at 451 5) Selvey v D.P.P. (1970) A.C. 304. 6) (1960) 102 CLR 252 at 359 7) (1962) A.C. 635 8) Ibid at 699; (1962) 1 All E.R. 569 at 604

in some other ways accentuate the difficulties. He proposed that the term "character" in proviso (f) should be construed to mean "reputation" only and that it should not include "diposition" as the Court of Criminal Appeal decided in R v. Dunkley[1] and Lord Simon said in Strirland's case[2]. One effect of this would be to exclude from the terms of the prohibition evidence of particular acts, not amounting to offences; so that the admissibility of such acts would depend purely on rules of common law and would not need to be brought within the exceptions of proviso (f). And in view of the difficulties to which the construction of the Act gives rise, there seems to be much to be said for an approach which will confine it to the narrowest possible limits and leave as wide an area as possible to be dealt with under common law rules. But Lord Denning[3] with an uncharacteristically strict regard (with respect) for the doctrine of precedent, thought it "far too late" to uphold this argument. Lord Reid, on the other hand, clearly thought it open to the House to reconsider the matter if it should be directly raised. Lord Devlin also thought that the point was still open at the level of the House of Lords. The point that "character" in Section 1 (f) means solely "general reputation" as Lord Devlin sugggested was later raised again, and it is submitted, finally rejected in Selvey v. Director of Public Prosecutions[4]. It is interesting to note that the point never appears to have received judicial support in Australia. As earlier pointed out above, the effect of the construction suggested by Lord Devlin would be revolutionary but in some ways may be difficult to apply. This is

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1) (1927) 1 K.B. 323 at 329 2) (1944) A.C. 315 at 324; (1944) 2 All E.R. 13 at 17 3) (1962) A.C. 635 at 671; (1962) 1 All E.R. 569 at 580 4) (1970) A.C. 304;

certainly so when the accused himself is testifying to his good character: one can hardly testify to one's own reputation with any confidence, for a man's reputation is what people say about him when he is not there. As Lord Dennning stated in Plato Films v Speidel[1]: "The plaitiff cannot speak as to his own character and reputation because he does not know what other people think of him, or at any rate he cannot give evidence as to what they think of him." And it would certainly upset past decisions if it were to be held that a man who swore that he had led a good clean life and gone to Mass every Sunday had not given evidence of his own good character". This development does something to temper a rather irrational rule. Furthermore it is difficult to see how there can be an "imputation" on a general reputation; it may be that the section is intended to mean: "If the nature or conduct of the defence is such as to involve an assertion that the prosecutor is or the witnesses for the prosecution are of bad general reputation", but this would be a question of fact (whether or not the subject had a certain reputation) whereas the actual line of defence envisaged by the section is that the subject is not entitled to his apparent reputation. It would only be in rare cases, and for few purposes, that the Act would come into effect, if read in such a way (which the wording will not support).

Moreover if throughout the entirety of Section 1 (f) "character" were to mean "reputation", it would be difficult to construe part of Section 1 (f) (ii) under which the accused loses his shield if the

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1) (1961) A.C. 1090 at 1143

nature or conduct of his defence involves imputations on the "character" of the prosecutor or the witnesses for the prosecution. It would then become possible to argue that someone who swore that a policeman had extracted a confession from him by violence was not casting imputations on the character of a witness for the prosecution[1]. It was just such an argument that was rejected by the House of Lords in Selvey v. Director of Public Prosecutions[2]. In that case various members of the House of Lords made passing reference to the problem of the meaning of "character". The defence in that case, that the complainant was a male prostitute, involved imputations on the complainant's character, whichever meaning was adopted. The accused alleged that the complainant had offered to go on the bed with him for a pound, told him that he had already gone to bed for that sum with another man, and because his offer was rejected, dumped indecent photographs in the accused's room out of pique. Viscount Dilhorne, Lord Hodson and Lord Pearce were all inclined to reject Lord Devlin's construction and adopted the approach favoured by Lord Simon in Stirland's case . Lord Pearce said: "The words 'involve' and 'imputations' are wide. It would be playing with words to say that the allegation of really discreditable matters does not involve imputations on his general reputation, if only as showing how erroneous that reputation must be[3]. It may therefore now be taken to be settled law that "character" when used in the Act of 1898 (and its equivalents in other jurisdictions) means both disposition and reputation. It is submitted that this is sensible and satisfactory for

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1) Cross on Evidence (5th ed.) at P.247; Lord Devlin considers that the word 'character' means "reputation" throughout the law of evidence - see Dingle v Associated Newspapers (1961) 2 Q.B. 162 at pp. 195 and 198; see also Fridman, The Solicitor's Quarterly Vol. 1, P.211 (1962) 2) (1970) A.C. 304; (1968) 2 All E.R. 497 3) (1968) 2 All E.R. 497 at 522

the practical working of the Act, and deserves more enthusiastic support than the grudging status of "too late to argue the contrary" which has sometimes been accorded to it. Indeed, the facts of R v, Dunkley[1] in which Lord Hewart C. J., employed exactly that epithet, seem to show that much of the 'code' in particular the operation of the part of Section 1 (f) (ii) dealing with "imputations on the charcater of the prosecutor or the witnesses of the prosecutor", would be meaningless on a Rowton view. And if one may observe from all that has been said, the root of the trouble appears to lie in the assumption that the distinction between disposition and reputation, necessarily means that the word "character" is being used in one or other or both senses. The judgements on R v. Rowton[2] make it abundantly plain that what the court is seeking in every case, is evidence of the accused's disposition - is he the kind of man who would do the kind of act charged or, is he the kind of man who should be believed on oath? The difference is not so much over the meaning of "character", as over the means by which disposition may be proved. It may be taken to be settled that a prisoner is liable to be cross-examined under the proviso, if he calls a witness to speak to his good reputation or cross-examines the Crown witness with a view to establishing it, if he adopts either of these courses with regard to his conduct as showing good disposition, or if he gives evidence on the subject himself. We have seen that it is possible that the character witness could be cross-examined about rumours and

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1) (1927) I K.B. 323 at 329 2) (1865) Le. & Ca. 520

suspicions affecting the accused, although the latter cannot be asked whether he was suspected of crime unless his method of giving evidence of his character takes the form of a specific denial of this fact.

The Criminal Law Revision Committee have recommended that the word "character", the construction of which has caused difficulty in England, as shown in the discussion above, should be abandoned in favour of "disposition", "reputation" and, where appropriate "credibility"[1]. The Thomson Committee on the other hand, disagree with that recommendation[2]: "In our view, there is no justification for change. There may well be cases which will raise narrow issues as regards attempts to set up good character but in our view neither the attempts of the Criminal Law Revision Committee nor any other that we can think of would in practice obviate the difficulties raised in such cases. Accordingly we are not in favour of any amendment of the law as presently enacted."

(iii) THE PURPOSE OF CROSS-EXAMINATION UNDER THE EXCEPTION

Lord Sankey stated as follows in Maxwell v. Director of Public Prosecutions[3]: "If the prisoner by himself or his witnesses seeks to give evidence of his own good character, for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character so that he may fairly be cross-examined on that issue just as any witness called by him to prove his good character may be cross-examined to show the contrary". On the other hand however one should take note of the

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1) CLCR paras 118, 133-136; 2) Thomson, para 50:26 3) (1935) A.C. 309 at 319

decision in the Australian case of R v. Micolucco[1], where rebuttal evidence following a good character claim by the accused was held to be inadmissible on the grounds that it was no more than evidence of complaints about the accused.

It is clear from previous discussions that evidence of the accused's bad character may be admissible for one or other or both of two purposes. First to show that he is not to be believed and second to show that he is guilty of the offence charged. In the present context of Section 1 (f) (ii) of the Criminal Evidence Act 1898, it seems obvious that the evidence is relevant to the former and not (or at least directly) to the latter.

In R v. Wood[2], a man, charged with indecent assualt upon a girl, put his character in issue and was held by the Court of Criminal appeal to have been properly cross-examined concerning a conviction for an indecent assualt on another girl, which assualt took place after that for which he was being tried. It was said that the chronological order of events did not render the conviction any less admissible as evidence tending to show that the accused was not of good character "at the time of the second trial"[3], and clearly this could only mean that the the conviction was regarded by the Court as relevannt to the credibility of the accused testimony. In R v. Donnini[4], Barwick C. J., was clearly of this view: "when the sole purpose of the admission of a prior conviction is to deny a suggestion of good character and to impugn the credit of the accused the jury should be specifically instructed that they may only use the

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1) (1957) SR (NSW) 434 2) (1920) 2 K.B. 179 3) (1920) 2 K.B. 179 at 182 4) (1972) 128 CLR 114

evidence for those purposes."[1] Nevertheless the judgements given in that case illustrate that differing views may be taken on this question of relevance"[2].

In R v. Coltress[3], the appellant was charged with the theft of a bottle of whisky from a store. At his trial his defence involved imputations on the character of witnesses for the prosecution. At the time of his arrest, the appellant had been a man of good character, but ten months later, befor his trial, he had been convicted of the theft of a credit card and of obtaining credit by the use of that card. Counsel for the prosecution applied to cross-examine the appellant as to two convictions under Section 1 (f) (ii) of the Criminal Evidence Act, 1898, and the appellant's counsel opposed the aplication contending that the prejudicial effect of admitting those previous convictions outweighed their evidential value. The judge, in his discretion permitted the cross-examination, and directed the jury, inter alia, that where a defence involved the imputation on the character of prosecution witnesses, then the appellant's own character must be known to the jury as well. The jury convicted on a majority verdict. On appeal that the trial judge exercised his discretion wrongly. Orr, L. J., giving the judgement of the court said: "The next ground of appeal was that the judge wrongly exercised his discretion in allowing cross-examination of the defendant as to the convictions in questions, which took place 10 months after his arrest for the offence on which he was being tried,

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1) Ibid at 127 2) See judgements of McTiernan and Menzies JJ.
3) (1978) 68 Cr. App. Rep. 193

and it was argued that at the time of the offence the accused was a man of good character and would have remained so had the trial taken place before the subsequent convictions of which evidence was admitted. For this reason it was said, it was a wrong exercise of discretion to admit about the convictions in evidence. We have no doubt that the judge had in mind the fact that these were subsequent convictions in coming to the conclusion whether they should be admitted in evidence, and we find no substance in this ground of appeal."

A similar decision had been given in an earlier case in Australia - R v. Woolcott Forbes[1], where evidence of frauds perpetrated after the Woolcot offence charged was admitted to rebut evidence of good character from the accused.

And in R v. Longman and Richardson[2], Longman and Richardson were convicted of conspiring to pervert the course of public justice. They sought to discredit a prosecution witness C. by, inter alia, calling H. as to her credibility. After H. had been asked if he were aware of her reputation for veracity and if he would believe her on oath and had replied: "I would say that in certain particularsshe could be believed on oath . But ... ". The judge refused to allow further questions to be put to him. As a result of the attack on C. the previous bad character of Longman was elicited and the judge directed that the jury could make use of this when deciding whether they could believe him. They appealed on the grounds, inter alia, (1) that the judge was wrong in stopping the examination of H., (2) that the direction was wrong. It was submitted that evidence of a

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1) (1944) 44 SR (NSW) 333; 61 WN (NSW) 219 2) (1969) IQ.B. 299

defendant's bad character is admissable only in particular circumstances and can be used only in relation to the situation which rendered it admissible; thus the evidence of Longman's bad character could only be used to neutralise the attack on C.[1] The Court of Appeal held, dismissing the appeals (1) that the defence were entitled to ask H whether from his personal knowledge of C. he would believe her on oath[2]; but there was no authority whereby he could be asked for any qualification of, or reasons for, his answers. Despite the irregularity of stopping the questions being put to H., there had been no miscarriage of justice since it transpired that the defence sought to elicit H.'s reasons; (2) there is nothing in the Criminal Evidence Act 1898 to suggest that the use of evidence of bad character should be restricted in the way submitted. Edmund Davis L. J. speaking for the Court of Appeal said[3]: "In our view, evidence of character, when properly admitted, goes to the credit of the witness concerned, whether the evidence disclosed good character or bad character, if the accused calls evidence of good character, and is shown by cross-examination to have a bad character, the jury may give this fact such weight as they think fit when assessing the general credibility of the accused." These observations were made in the course of the refutation of the over-sophisticated argument that, evidence of convictions having been volunteered by one of the accused in anticipation of the cross-examination he had invited by casting imputations on the character of Crown witnesses, the jury should have

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1) relying on R v Rowton (1864) 10 Cox 25; and R v Cook (1959) 43 Cr. App. R. 138 2) Gunewardene (1951) 35 Cr. App. R. 80; Toohey v Commissioner of Metropolitan Police (1965) 49 Cr. App. R. 148.
3) (1969) 1 Q.B. 299 at 311

been directed that the evidence merely showed the accused to be of bad character and did not go to his general credibility. They should not be taken to contradict what is implicit in Lord Sankey's statement quoted earlier that cross-examination of the accused on the issue of his good character raised by himself bears on the probability of his guilt.

Attention should equally be drawn to the observations made by Lord Pearce in Toohey v. Commissioner of Metropolitan Police[1], he said: "From olden times it has been the practice to allow evidence of bad reputation to discredit a witness's testimony. It is perhaps not very logical and not very useful to allow such evidence founded on hearsay. None of your Lordships and none of the counsel before you could remember being concerned in a case where such evidence was called. But the rule has been sanctified through the centuries in legal examinations and textbooks and in some rare cases, and it does not create injustice." The witness may be asked whether he is aware of the other's reputation and whether, from such knowledge, he would believe him on oath[2]: or, simply, whether he would believe him on oath[3]. In R v. Gunewardine[4] the Court of Criminal Appeal followed the rule as stated in Stephen's Digest of the Law of Evidence: "The credit of any witness may be impeached by the opposite party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not, upon their examination-in-chief, give reasons for their belief, but they may be asked for their reasons in cross-

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1) (1965) 49 Cr. App. R. 148 at 159-160 2) Mawson v Hartsink (1802) 4 Esp. 102 3) Watson (1817) 2 Stark 116 4) (1951) 35 Cr. App. R. 80

examination and their answers cannot be contradicted."

In R v. Bellis[1] Bellis was convicted of possessing explosives. he appealed on the ground inter alia, of misdirection as to the significance of his previous character in that the judge after saying that it was not a ticket to an acquittal continued: "but it is something which you must take into account in his favour really on the basis that a person of good character is less likely to commit this type of offence than a man of bad character." It was submitted that the proper direction would have been that possession of a good character makes a defendant's testimony more worthy of belief than that of a person of bad character. The Court of Criminal Appeal held, dismissing the appeal, that although there is no formal or standard direction on the matter the court took the view that the possession of a good character is primarily a matter which goes to credibility. The direction actually given was not less favourable than the direction which it was submitted should have been given.

The proposition stated by the trial judge seems with respect to be entirely correct. Long before the accused was entitled to give evidence (and so before his credibility could be an issue before the jury) it was settled that he was entitled to introduce evidence of his good character. This could only be on the ground that the jury was entitled to take it into account as making it less likely that the accused committed the crime. "The object of laying the latter [evidence of character] before the jury is to induce them to believe,

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1) (1966) I W.L.R. 234, (1966) 1 All E.R.552n; 50 Cr. App. R. 88

from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution"[1]. At the present day, evidence of the accused's good character would be no less admissible because he did not give evidence. In such a case his credibility would not be before the jury but he would have a right that they should know his good character and take this into account in deciding whether he committed the offence. Clearly good character is also relevant to the accused's credibility. Historically, this was not its primary purpose. It is respectfully submitted that whether good character is a matter going primarily to creditibility or to the accused's guilt must depend on the circumstances of the case and nature of the evidence of character tendered.

(IV) THE DIVISIBILITY OF THE CHARACTER OF THE ACCUSED

As Cross rightly pointed out: "When the prisoner urges that he ought to be believed, when he swears that he was innocent of a sexual crime because he has a good character for sexual morality, it certainly does tend to refute his contention to show that he was convicted of an indecent assualt; but it is open to question whether a conviction for theft has the same effect"[2]. This raises the issue of the propiety of a dictum in R v Winfield[3] on the assumption that the accused was cross-examined about his character. According to this dictum which was given by Humphreys J., while delivering the judgement of the Court of Criminal Appeal in that case: "There is no

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1) R v Stannard (1837) 7 C& p 673 per Patterson J; and see R v Shrimpton (1851) 5 Cox 387; R v Rowton (1865) 10 Cox 25 2) Cross on Evidence (5th ed) at p.428 3) (1939) 27 Cr. App. Rep. 139

such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half."

It will be recalled that this issue has earlier been discussed under the common law rule - the present purpose is to consider the divisibility of the character of the accused under the 1898 Criminal Evidence Act[1]. It will also be remembered from the first discussion of the case of R v. Winfield, that conflict between the two reports of the case was highlighted. While on the one hand a report indicates that it was the defence witness to character who was cross-examined as to Winfield's previous convictions for dishonesty[2], another report on the other hand suggests that it was Winfield who was cross-examined as to his previous convictions for dishonesty[3]. It is therefore necessary in the circumstances to take the case both ways, first as already done, as a decision on the position at common law where the prisoner produces a character witness, who is cross-examined as to previous convictions of the prisoner not relating to the specific trait that is relevant and then as it is presently intended, as a decision under the Criminal Evidence Act, 1898 where the prisoner avails himself of the statutory opportunity of giving evidence on oath, and is cross-examined as to previous convictions.

Though the Criminal Evidence Act, 1898, made the accused a competant witness in every case, he is not treated in every respect like an ordinary witness. We do know that he is given a shield against certain cross-examination by proviso (f) to Section 1 of the Act. It is further provided that in certain exceptional cases the

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1) See 1975 Scotland Act; 1958 Crimes Act (Victoria) 2) The headnote to 27 Cr. App. Rep. 139, and so does the statement of facts. 3) (1939) 4 All E.R. 164

prisoner cannot avail himself of this shield. On the other hand we do know that an ordinary witness can be cross-examined as to any previous conviction, and if he denies the conviction it can be proved against him under Section 6 of the Criminal Procedure Act, 1865[1]. In Scotland however, the only way to discredit a witness is to question as to his honesty; you cannot cross-examine on anything else. A first reading of proviso (f) suggests that where the prisoner becomes a witness, and one of the exceptions applies, as it did in Winfield's case as he gave evidence of his good character, he can be cross-examined as to any previous conviction whatsoever. It will be recollected that Winfield was convicted of indecent assualt upon a woman and that he called a witness to speak of his good behaviour with ladies. He (Winfield) had previously been convicted of larceny, and it is not clear whether this conviction was put to his character witness, in which case the matter fell to be determined by the Common-law principles that have already been discussed, or whether the cross-examination concerning the conviction was of Winfield himself under Section 1 (f) (ii) of the Act of 1898 - (it is the latter that is under consideration). In either event, the Court of Criminal Appeal appears to have approved of the cross-examination, although their observations on the subject were obiter dicta because the conviction was quashed on account of the inadequacy of the direction to the jury on the subject of corroboration.

There are apart from Winfield's case, two "sub silentio"

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1) See S.12 of the Evidence Act 1908 (New Zealand); see too R v Morris (1959) 43 Cr. App. Rep. 206; R v Gilday (1924) VLR 42

authorities that a previous conviction of the prisoner can be proved in a case falling under exception (ii) to proviso (f), even though it does not relate to the specific trait involved. In R v. Solomon[1], Solomon was indicted for attempted burglary. He gave evidence on oath that he was in respectable employment. On his arrest he had stated that he was a respectable man, earning his living, and had never robbed anyone of a penny. He was cross-examined, despite objections, as to previous convictions for assualt and keeping a gaming-house. Solomon was convicted. On appeal, the Court of Criminal Appeal found it unnecessary to decide whether Solomon had in fact put his character in issue, as they held that there had been no substanial miscarriage of justice - (the appeal was therefore dismissed)[2], even if the evidence ought not to have been admitted, as it was most unlikely, having regard to the nature of the previous convictions, that their disclosure influenced the jury at all. It is submitted that this is an unfair decision. If the suggestion is correct that juries will disregard previous convictions that do not relate to the specific trait, even though the judge has given them no warning on the point, then the whole object of the present discussion is lost, but it is submitted that such evidence is highly prejudicial and likely to influence the jury. There is no doubt , however, that this case is an authority, sub silentio as the point was never argued, that where the prisoner has given evidence on oath and thrown away their shield supplied by proviso (f) by giving evidence of his good character, he may be cross-examined as to previous convictions

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1) (1909) 2 Cr. App. R. 80 2) Criminal Appeal Act, 1909, 7 Edw. 7, C. 23, S. 4 (i) proviso

whether or not they relate to the specific trait.

The other sub silentio authority, R v. Steinie Morrison[1], is of great importance to the subject under discussion. Morrison was indicted for a brutal murder. One prosecution witness, Mrs D., was cross-examined by Morrison's counsel, as to whether she kept a brothel. Morrison later gave evidence on oath, and it was held that the cross-examination of Mrs D. was an imputation on the character of a prosecution witness within exception (ii) to proviso (f), and that Morrison could therefore be cross-examined as to his previous convictions forlarceny and burglary, though he had never been convicted of a crime of violence. Morrison's counsel argued that no imputation had been cast upon Mrs D., within the exception, but he did not take the point that the previous convictions should be excluded as not relating to the specific trial. Darling J., admitted the previous conviction, but there were two matters on which the evidence might be relevant and admissible, first the credibility of the prisoner as a witness, and secondly his guilt of the offence charged. In this summing-up, the judge cautioned the jury as to the danger of his evidence warping their judgement, and instructed them to confine their use of it to Morrison's credibility as a witness:

" ... the only use to be made of these previous convictions is to show that when you have to rely upon his (the prisoner's) word as contradicting something stated by somebody else, or something which is not corroborated, you have not the word of a person who has done

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1) (1911) 6 Cr. App. Rep. 159

nothing wrong ... you have only the word of a man whose past career has been what you know it to have been"[1]. This summing-up apparently received the approval of the Court of Criminal Appeal, as Lord Alverstone C. J., delivering the judgement of the court, remarked: "The cross-examination of Mrs D ... exposed the appellant to the risk of his past life being inquired into. It had become a question of credibility: who was to be believed when one contradicted the other?"[2].

The importance of Morrison's case is that it decides that there are circumstances in which previous convictions are admissible in cross-examination, under exception (ii), to attack the credibility of the prisoner as a witness, but must not be used to prove his guilt. This question was examined by Julius Stone in two learned articles[3], and he came to the conclusion that in all the exceptions (i), (ii) and (iii), to proviso (f), the cross-examination can be used both to attack credibility and to show guilt, desirable as it is in the case of exception (ii) that it should be confined to credibility[4]. His main reason for so holding is that the legislature must have known that there was a great danger of the jury using such evidence to find guilt, yet it made no attempt to seperate the two uses, and that this is the most significant since explanation (i) expressly refers to admissibility to show guilt as distinct from credit. The position is of course clear under exception (i), which is a reference to the common law rule of cases such as Makin v. Attorney General of New South Wales[5], permitting the prosecution to put in evidence previous

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1) Notable British Trials at 277 2) 6 Cr. App. Rep. 159 at 169
3) 51 LQR 443 & 58 LQR 369 4) 51 LQR 443 at 455-461 and 58 LQR 369, 384 5) (1935) A.C. 309

similar offences committed by the prisoner to prove system, to rebut a suggestion on the part of the prisoner of accident or mistake etc.

And, thus coming back to the case of Winfield, one could say that so far as the cross-examination of the prisoner was concerned, it ought not to have been used by the jury as a direct means of establishing his guilt, because it was only relevant on the very doubtful footing that a thief is more likely to commit an indecent assualt than an honest man. Its relevant to the credibililty of the prisoner's testimony is not much greater either although, there is just a little more force in the argument that a convicted thief is more likely to lie than others. However on the authority of R v. Morrison[1], it can be viewed as a matterr affecting credibility; that is, Winfield's cross-examination can be justified on the footing that having put his character in issue, he fortified his right to be treated, as regards cross-examination, otherwise than as an ordinary witness, and an ordinary witness may be cross-examined about a conviction for any offence with a view to shaking his ceredibility. It is significant to mention that R v. Winfield[2] has received some support from a dictum of Lord Simon in Stirland v. Director of Public prosecutions[3] , though it remains to be seen whether this will be held tantamount to House of Lord's approval of the course that was adopted in that case. Lord Simon's third proposition in Stirland's case was that: "An accused who 'puts his character in issue' must be regarded as putting the whole of his past record in issue. He cannot

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1) (1911) 6 Cr. App. R. 159 2) (1939) 27 Cr. App. Rep. 139
3) (1944) A.C. 315 at 324; (1944) 2 All E.R. 13 at 18

assert his good conduct in certain respects without exposing himself to inquiry about the rest of his record so far as this tends to disprove a claim to good character." The qualification added by his Lordsship "so far as this tends to disprove a claim for good character", seems to leave the question much as it was before.

However, in Selvey v. Director of Public Prosecutions[1], Selvey had convictions for dishonesty and homosexual convictions: only the latter were allowed to be put to him - the accused in the case was charged with buggery.

In the New Zealand the case of R v. Johnston[2], the appellant had been found guilty of an indecent assualt on a six year old girl and the Court of Appeal, without refering to R v. Winfield or Stirland's case, held that the trial judge had not exercised his discretion wrongly in allowing the prosecution to cross-examine the accused as to his previous convictions for dishonesty.

In the light of Selvey's case, the New Zealand Court of Appeal is unlikely to decide in the same way in future[3]. Though by and large the position cannot be said to be exactly settled regarding this matter, I must say however that I will be more willing to abide by the decision in Selvey because it is a more just line of reasoning to my mind. And it is significant to point out that there hasn't been any other authority to the contrary since then, at least to the best of my knowledge and commentators don't seem critical of it either.

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1) (1968) 2 All E.R. 497; Cf Lord Denning in the Court of Appeal, (1967) 3 WLR 1637, 1640 2) (1956) NZLR 516; Cf R v Woods (1956) 56 SR (NSW) ,142 3) Cf R v Fisher (1964) NZLR 1063

(V) IMPUTATIONS ON THE CHARACTER OF THE PROSECUTOR OR THE WITNESSES FOR THE PROSECUTION

The second limb of Section 1 (f) (ii) of the Criminal Evidence Act, 1898[1], permits cross-examination of the accused tending to show that he has commited, been convicted of, or charged with other offences or is of bad character, if: "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution."

It seems that this is the only part of the provisions which has been the subject of reported decisions in the Scottish Courts[2] and as we shall soon find out, they have interpreted it differently from the House of Lords[3].

It is proposed to preface the discussion of the main problems arising on the application to the statutory provision by dealing with some minor matters, mainly of definition.

(a) DEFINITION

"Nature or Conduct .. Imputations" - As will be seen, the word, "imputation" has generally been given its ordinary meaning. The main difficulty which has arisen is due to the words "the nature or conduct of the defence is such as to involve imputations". In O'Hara v. H. M. Advocate[4], Lord Justice-Clerk Thomson faced up to the interpretational problems thrown up by the section and concluded:

"the real difficulty ... lies in what is meant by the 'nature or conduct of the defence'. 'Conduct' by itself would not create difficulty as this would mean the actual handling of the case by the

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1) See SS. 141 (f) (ii) and 346 (f) (ii) of the 1975 Scotland Act; S. 399 (e) (ii), 1958 Crimes Act - Victoria; S 1 (f) (ii) Criminal Justice (Evidence) Act 1924 - Ireland. 2) O'Hara v H M Advocate (1948) J.C. 90 applied in Fielding v H M Advocate (1959) J.C. 101 H M Advocate v Deighan (1961) SLT (Sh. Ct) 38; and H M Advocate v Grudins (1976) SLT (Notes) 10. 3) Selvey v D.P.P. (1970) A.C. 304 4) (1948) J.C. 90

accused or his advocate so as to bring about a general attack on character. I find 'nature' much more difficult, as at first blush it seems to point to something inherent in the defence and therefore apt to cover for example provocation in a charge of assualt... . But the more general considerations I have mentioned persuade me to the view that 'nature' is to be read, not as meaning something which is inherent in the defence, but as referable to the mechanism of the defence; nature being the strategy of the defence and conduct the tactics."[1]

"The Prosecutor" - The Act does not define "prosecutor". Any question as to the meaning of the word must be largely academic, for in the vast majority of cases the prosecutor, whoever he be, will be a witness for the prosecutions.

A magistrate whoconducts the preliminary investigations which resullts in the committal for trail of the accused is not the prosecutor within the meaning of the section; nor is a police officer merely on the ground that he was involved in the inquiry or the collection of evidence. In R v. Westfall[2] it was held that defence allegations that the magistrate had unfairly deprived accused of opportunity of calling a witness, and that a detective, who was not a witness, had coached the victim in his evidence and struck accused when he protested, was not within the purview of Section 1 (f) (ii) of the Criminal Evidence Act 1898. And in the Australian case of R v. Billings[3], an attack upon counsel for the Crown appea-

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1) Ibid at 98. See also Attorney-General v Campbell (1928) 62 I.L.T.R. 30 2) (1912) 7 Cr. App. Rep. 176 3) (1961) V R 127

ring to prosecute have been held to fall outside the equivalent proviso, so that they did not warrant cross-examination under the section.

In a case of homicide the deceased is not the prosecutor, for as was pointed out in R v. Biggin[1], "(there ~~is~~) neither the will nor the intention on his part to prosecute. He (is) dead and can take no part in the proceedings"[2]. In that case the appellant was indicted for murder. The defence set up was that the act had been done in self-defence, the killed man having made improper overtures to the appellant, and on these being rejected had violently assualted him. Questions were addressed to the appellant in cross-examination which had no relevance to the charge of murder, but which tended to show that the appellant had previously committed an offence other than that for which he was being tried. No evidence had been given or questions asked to show that the appellant had a good character. The questions although objected to were admitted on the grounds that the dead man was the prosecutor and that the defence involved an imputation on his character and also because they tended to show that the appellant did not always speak the truth. The appellant was convicted of manslaughter and appealled. The court held that the questions were not admissible on the ground that the defence involved an imputation on the character of the dead in as much as he was not the prosecutor within the meaning of Section 1 (f) of the Criminal Evidence Act, 1898; and it was further held that the questions were not admissible to prove that the appellant did not always speak the

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1) (1920) I.K.B. 213; see also R v Gillis (1957) V.R. 91 2) (1920) 1.K.B. 213 at 219; - [cases are conceivable in which the prosecutor would not be called as a witness and imputations on his character would none the less expose the accused to cross-examination under the legislation]

truth, and that therefore the conviction must be quashed.

A similar ruling was given in the Scottish case of H. M. Advocate v. Grudins[1]. The accused was charged on indictment that on 29th or 30th March 1975, she assualted her husband, John Grudins, and did stab him on the body with a knife or similar sharp instrument and did murder him. In the course of the trial the panel gave evidence. In examination-in-chief the witness stated that while she and her husband were living apart between 1966 and 1973 he did not send her any money. In cross-examination the advocate-depute asked: "Did you remain faithful to your husband while you were in England?" Counsel for the defence objected to the question and Lord Stewart heard argument from counsel in the absence of the jury. Counsel based his objection on the terms of Section 1 (f) of the Criminal Evidence Act 1898 arguing that the question and the line of questioning foreshadowed tended to show that the accused was of bad character. The advocate-depute countered that he was entitled to ask the question in order possibly to explain why the panel's deceased husband had failed to support her during their separation, a matter which had been raised in evidence-in-chief. Such a situation was covered by the terms of Section 1 (f) of the Act. Had he been alive the accused's husband would have been a witness for the prosecution, and it would be illogical to allow cross-examination if he were alive and to disallow it when he was dead. In sustaining the objection for the defence and disallowing the question Lord Stewart said: "In O'Hara v.

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1) (1976) SLT (Notes) 10;

H. M Advocate[1], it was assumed that the prosecutor would always ask for leave to cross-examine. I see much force in the argument of the advocate-depute that it is artificial to distinguish between witnesses for the prosecution and deceased persons, who, if the crime had been a lesser one, would have been alive to be prosecution witnesses. Nevertheless, I do not consider that I would be justified in interpreting the words of the statute when they refer to 'witnesses forthe prosecution' as flexibleenough to include deceased persons who are not, and cannot be, such witnesses. However if I am wrong in this, and the situation does fall within the second exception to paragraph (f) of Section 1 of the 1898 Act, I have a discretion to refuse to allow this cross-examination."

"Witnesses for the Prosecution" - This phrase presents no difficulty, but it should be observed that an accomplice called as a witness is in the same position under the section as any other witness. Even if the prosecution has already impugned the character of the witness by stressing that he was an accomplice, cross-examination of witness which imputes to him the commission of some other crime will render the accused liable to cross-examination on his convictions or character as R v. Cohen[2] shows. In that case it was held that it is an "imputation" within Section 1 (f) (ii) of the Criminal Evidence Act 1898, to suggest that a witness for the prosecution tended as an accomplice, and a person of bad character, has committed a crime other than that he has admitted. Similarly as R v, Watson[3] illustrates, where the prosecution has already called into question

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1) (1948) J.C. 90 2) (1914) 10 Cr. App. Rep. 91 3) (1913) 8 Cr. App. Rep. 249

the character of the witness by stressing that he was an accomplice, cross-examination of the witness which otherwise involves imputations on his character beyond what has already been revealed to his discredit by the prosecution will in return open the accused to cross-examination on his convictions or character. In that case, an unrepresented defendant was charged with receiving, and made various allegations against a prosecution witness who had been put forward by the prosecution as an accomplice. During the defendant's cross-examination he charged the witness with sending him blackmailing letters. Pickford, J., said that the allegations seemed to cast imputations on the character of the witness, because it suggested that he had told false stories about his relations for the purpose of his own advantage and had also sent the appellant threatening letters. The court concluded that the appellant was not satisfied with the statement that the witness was an accomplice "but wished to elicit more in order that the jury should not accept his evidence." The court was therefore not able to say that the evidence as to the appellant's character was wrongly admitted, but significantly, Pickford, J., said it was not a question for the court whether it would have exercised its discretion in the same way - "it might have worked a considerable injustice" because the jury heard the full bad history of the appellant, but only a portion of the witness's bad character.

And an Irish case goes slightly further than those cited above, by holding that there is an imputation within the section if the defence

alleges that a witness who, if the accused committed the crime charged, was admittedly an accomplice, himself committed the crime. In The People (Attorney General) v. Coleman[1], the accused was found guilty on two counts of criminal abortion. At his trial he was asked questions in cross-examination tending to show that he was of bad character. It was held that these questions were admisible in view of the fact that counsel for the defence had asked questions of the witnesses or the prosecution, the woman in respect of whom the charge was brought and her husband, tending to show that the husband had committed the offence himself; that husband and wife had conspired to charge the accused with the crime; that prior to her marriage the wife had used contraceptives, contrary to the teachings of her religion; and that the witness had married with the object of defeating justice, these suggestions being imputations on the character of witnesses for the prosecution within the meaning of Section 1 (f) (ii) of the Irish Criminal Justice (Evidence) Act, 1924[2].

Similar principles regarding accomplice presumably apply to any witness tendered by the prosecution as a witness of bad character.

The phrase "the witness" has not been read by the courts as requiring imputations on the character of more than one witness. Notkes, referring to the Interpretation Act 1898, which, by Section 1 (f) (1) (b), provides that, in an Act of Parliament, unless the contrary intention appears, words in the plural shall include the singular, commented as follows "Proviso (f) (ii) is far from happily drafted. It is not clear that it was necessary to mention both the

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1) (1945) I.R. 237, Irish C.C.A. 2) Equivalent of S. 1 (f) (ii) of the Criminal Evidence Act, 1898

prosecutor and the witnesses for the prosecution, for the latter will normally include an actual prosecutor and the Crown as prosecutor is not likely to suffer imputations; or to refer to imputations and witnesses in the plural, since a single imputation on a single witness is sufficient, presumably by virtue of the Interpretation Act, 1898, Section 1 (i) (b), to bring the proviso into operation, and has done so in various cases ... without argument on plurality or singularly."[1]

(b) GENERAL PROBLEM OF INTERPRETATION

We may now concern ourselves with the interpretation of the phrase "the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." The difficulty about this phraseology is that unless it is given some restricted meaning a prisoner's bad charcater, ifhe had one,would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; in many cases a plea of not guilty coupled with an assertion of innocence in the witness box would render the accused liable to cross-examination on his criminal record, on account of the tacit suggestion that the prosecutor or one of his witnesses had been guilty of perjury. In R v. Cook[2], Devlin, J., spoke about the nature of the basic problem arising on the interpretation of these words thus: "It is clear from the subsection (ie. Section 1 (f) of the

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1) Nokes - "Imputations on The Prosecution" - (1959) 22 MLR 511 at 512 2) (1959) 2 Q.B. 340 at 344-345

Criminal Evidence Act 1898) as a whole that it does not intend that the introduction of a prisoner's prevoious convictions should be other than exceptional. The difficulty about its phraseology is that unless it is given some restricted meaning, a prisoner's bad charcater, if he had one, would emerge almost as a matter of course. Counsel for the defence could not submit that a witness for the prosecution was untruthful without making an imputation upon his character; a prisoner charged with assualt could not assert that the prosecutor struck first without imputing to him a similar crime". The avoidance of such a conclusion has led to an uneasy conflict of authority, palliated by an extensive exercise of the court's discretion. The authorites as we shall see, show that the courts have endeavoured to surmount this difficulty in two ways. First, it has in a number of cases construed the words of the subsection as benevolently as possible in favour of the accused. Secondly, it has laid down that, in cases which fall within the subsection, the trial judge must not allow as a matter of course questions designed to show bad character; he must weigh the prejudicial effect of such questions against the damage done by the attack on the prosecution witnesses, and must generally exercise his discretion so as to secure a trial that is fair both to the prosecution and to the defence.

Next, the authorities will be briefly reviewed before that rationale of the later part of Section 1 (f) (ii) and the purpose of the cross-examination which it permits are considered.

(C) IMPUTATIONS

In R v. Rouse and Another[1], the view was expressed that, raising a defence, even in forcible language was not necessarily casting imputations on the prosecutor or his witnesses. In that case, upon the trial of an indictment for conspiring by false pretences to induce the prosecutor to sell a mare, the prosecutor gave evidence that one of the defendants had previously offered to buy the mare on credit. The defendant in question was callled as a witnesss for the defence, and was asked in cross-examination, "Did you ask the prosecutor to sell you the mare in April, or has he invented all that?" To which he replied, "No it is a lie, and he is a liar". Counsel for the prosecution was thereupon allowed to cross-examine the defendant's as to previous convictions. The court held that the defendant's answer amounted only to an emphatic denial of the truth of the charge against him; that the nature or conduct of the defence was not such as to involve imputations on the character of the prosecutor within the meaning of Section 1 sub-section (f) (ii) of the Criminal Evidence Act 1898, and that therefore the defendant was not liable to be cross-examined as to his previous character. In his judgement Lord Alverstone said: " Either the answer amounted to no more than a plea of not guilty put in forcible language such as would not be unnatural in a person in the defendant's rank in life or it had nothing to do with the conduct of the defence."[2] In the same case, Darling, J., had similarly decided that to deny a fact alleged by the prosecution

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1) (1904) 1 K.B. 184; see also R v Stratton (1909) 3 Cr. App. Rep. 255; R v Parker (1924) 18 Cr. App. Rep. 14; R v Manley (1962) 46 Cr. App. Rep. 235; 2) (1904) I k.B. 184 at 189

is not necessarily to make an attack on the character of the prosecutor or his witnesses; in his words: "such a denial is necessary and inevitable in every case ... , and is nothing more than a traverse of the truth of an allegation made against him; to add in cross-examination that the prosecutor is a liar is merely an emphatic mode of denial, and does not affect its essential quality"[1]. In R v. Grout[2], the court said that a declaration by the accused that the constable charging him was telling lies was only an emphatic way of stating the charge was not true, and was not an imputation upon the constable's character within the meaning of the exception contained in the paragraph. The same view was adopted by the Supreme Court of South Australia in Hewitt v. Lenthall[3], and by the Supreme Court of Western Australia in R v. Martinelli[4]. Similarly Lord Goddard C. J., said in R v. Clark[5] "... I do not believe that any judge would allow a roving cross-examination into the prisoner's past merely because he said, 'The police constable is a liar', or 'The police constable is not telling the truth'; for all he is doing is pleading not guilty with emphasis ... " It may therefore be assumed that a judge would only in exceptional circumstances allow the prosecution to cross-examine the accused on his past record in answer to an allegation that prosecution witnesses are lying or that evidence is false.

However it appears that the judgement in the above cases have to be confined to the special facts of the cases, because there are cases where the defence allegation of untruthfullness go beyond the

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1) Ibid at 187 2) (1909) 3 Cr. App. Rep. 64 3) (1931) SASR 314
4) (1980) 10 WALR 33 5) (1955) 2 Q.B. 469 at 478

witness's evidence and this may account for the comparative ease with which the Court of Criminal Appeal concluded in R v. Rappolt[1] that an assertion by the accused that the prosecutor was such a horrible liar that his brother would not speak to him warranted cross-examination under Section 1 (f) (ii) of the Criminal Evidence Act 1898.

Generally when the veracity of the prosecutor or his witness is not challenged,the statute has often been construed favourably to the accused. He has for example in R v. Eidenow[2], been allowed to allege with impunity that a witness for the prosecution failed to hand over the proceeds of a cheque which he had been asked to cash. And in R v. Morgan[3], the charge against the accused was of obtaining by false pretences and obtaining credit by fraud. His defence in part was a denial of indebtedness. The accused also made an allegation that the prosecutor did not deliver an itemised bill and that his charges as an innkeeper were excessive. In his judgement, Lord Alverstone C. J., said: "You cannot twin a defence involving a bona fide dispute which might justify a man in declining to pay into an attack on the witnesses for the prosecution."[4] A similar reasoning process could be deciphered from the decision in H. M. Advocate v. Deighan[5]. In that case, a panel charged on indictment with house-breaking and assualt upon the occupier of the home lodged a special defence of self-defence. At the trial, his solicitor suggested to the complainer that he (the complainer) was of violent temprament and proved convictions for the breach of the peace and

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1) (1911) 6 Cr. App. R. 156 2) (1932) 23 Cr. App. Rep. 145 3) (1910) 5 Cr. App. Rep. 157 4) Ibid at 161 5) (1961) S.L.T. (Sh. Ct.) 38

assualt against him. It was also put to the complainer that he kept the house as a boarding house to which he knowingly allowed prostitutes to resort with their clients for immoral purposes. The prosecutor then moved the court to allow questions to be put to the panel regarding his previous character. The panel's solicitor contended his questions were necessary to establish the plea of self-defence, and to set up his defence that he did not break into the house but was admitted to it by a prostitute who had received a key from the complainer. The court held that the motion should be refused.

It must be said that the efforts of the courts to interprete the words of the section even handedly, have resulted in the existence of a number of irreconcilable decisions, though it is fair to say that it will be too much to expect complete consistency on an issue like this. For instance, someone who is charged with receiving throws away his shield if he casts aspersions on the morality of the complainant as it happened in R v Jenkins[1]. The defendant was charged with stealing, or alternatively receiving, a coat which had been found in his possession and which the prosecutrix said was hers. The defence was that the coat was the property of another person, and it was suggested to the prosecutrix, who was married, that she had had sexual relations with the defendant. This was held to be an imputation on her character, but the court pointed out that where there had been such an imputation by reason of the nature or conduct

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1) (1945) 31 Cr. App. Rep. 1; see also R v Jones (1909) 3 Cr. App. Rep. 67

of the defence the judge still had a discretion whether to let in the defendant's character. And in R v. Morris[1], the appellant was charged with sexual intercourse with his stepdaughter, aged 11 (eleven). Questions were put in cross-examination to the girl on her having stolen from school, having had intercourse with a boy, in the habit of keeping bad company and coming home late at night, and to the girl's mother of having been found in the act of intercourse with a man not her husband. When the appellant gave evidence, counsel for the Crown obtained leave from the judge to cross-examine the appellant on a previous conviction for dishonesty, on the ground that the nature or conduct of the defence was such as to involve imputations on the character of the Crown witnesses within the meaning of Section 1 (f) (ii) of the Criminal Evidence Act 1898. It was held that as the general line adopted by the defence was to make suggestions to discredit the girl and her mother, there had been imputations on the character of Crown witnesses within the meaning of the section and the judge had rightly exercised his discretion in permitting cross-examination of the appellant on the previous conviction.

Similarly an alleged burglar who explains the presence of his fingerprints in the prosecutor's bedroom by an allegation of a homosexual relationship with him[2]; and an accused who raised suggestion of provocation by homosexual advances[3] have been held to lose their shield since they have by implication cast aspersionson the morality of the prosecutrix. However one would have expected by the same token that an allegation that the prosecutor is a habitual

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1) (1959) 43 Cr. App. Rep. 206; see also R v Gilday (1924) VLR 42
2) R v Bishop (1975) Q.B. 274; (1974) 2 All E.R. 1206 3) R v Cunningham (1959) 1Q.B. 288; (1958) 3 All E.R. 71

drunkard by someone charged with robbery would have the same effect since it is equally an aspersion on the morality of the prosecutrix. But curiously and for no obvious reason in R v. Westfall[1], it was held inter alia that a suggestion in cross-examination that the prosecutor is a habitual drunkard, is not an imputaion on character within Section 1 (f) of the 1898 Criminal Evidence Act. It has, however been held in R v Brown [2] that the statement that the prosecutor in a case of causing grevious bodily harm following a road accident, was quite drunk, was driving disgracefully, shouting abuse at other drivers and deliberately stopped in the middle of the road to prevent other drivers from passing, amounted to an imputation on the character of the prosecutor.

And in the Australian case of R v. Billings[3] it has been held that the final address of counsel for the accused is part of the conduct of the defence, and that a trial judge was entitled to apply the statute to permit the recall of the accused where in such addresses imputations had been cast of the kind mentioned in the section.

In R v. Preston[4], the suggestion that an identification parade had been unfairly conducted was held not to deprive the accused of his shield, because the defence was not conducted on the footing that the police inspector was a witness of such a character that he ought not to be believed. It might be worthwhile stating the full facts of the case. There, the appellant had been placed in an identity parade after a housebreaking. He was second from the end of a row and he

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1) (1912) 7 Cr. App. Rep. 176 2) (1960) Cr. App. Rep. 181
3) (1961) V R 127 4) (1909) I k.B. 568

heard a police inspector say something about "second" to a constable whom he sent to bring in a man who was to identify the appellant. When this man came in he immediately picked out a man standing second from the other end of the row. In his evidence at the trial the appellant referred to what had happened and he accused the Inspector of deliberately assisting the witness in his identification. The appellant was thereupon cross-examined as to previous convictions on the ground that his evidence "involved imputations" upon the prosecution. He was convicted and in the Court of Criminal Appeal, Channell, J., recited the words of Section 1 (f) of the 1898 Act and said: "It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct - not his evidence in the case, but his conduct outside the evidence given by him - makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence". No doubt, he added, the prisoner has said something about the inspector which involved a suggestion of improper conduct, namely that he had conducted the arrangements for identification in an unfair way - "a serious imputation upon the conduct of a man holding the position of inspector of police". But

he concluded that the allegation was made with reference to a matter which could not be said to be irrelevant. The conviction was quashed. It is however settled in R v. Wright[1] that a suggestion by a prisoner that admissions made by him when in custody were obtained by bribes or threats of a policeman was an "imputation" letting in character. It was alleged, inter alia, that a police inspector had bribed the appellant with tobacco. Darling, J., said: " The imputation in the case now before us was that the police inspector was not a fit person to remain in the force: had he done what was imputed to him there is no doubt that he could have been dismissed from the force; it is the gravest possible imputation, and cannot be excused by the contention that it was the only way open to the appellant of meeting the case against him". In Selvey v. Director of Public Prosecutions[2], Lord Dilhorne considered this decision to be irreconcilable with R v. Westfall[3], where there was also a suggestion that a confession had been obtained by violence. It is also impossible to reconcile the decision of Wright[4] with that in Preston[5], and indeed the words of Darling, J., quoted above are all the more remarkable - and the decision all the more unfair - if it is borne in mind that the identification sought to be fabricated by the inspector in R v. Preston was abortive and so formed no part of the case against the appellant. And it can scarecly be argued even for controversial purposes that a charge of conducting a false identity parade is less serious than one of securing admissions by bribery. It is true that

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1) (1910) Cr. App. R. 131; cf Attorney General v O'Shea (1931) I.R. 713 2) (1970) A.C. 304 at 305 3) (1912) 7 Cr. App. Rep. 176
4) (1910) 5 Cr. App. Rep. 131 5) (1909) I k.B. 568

in R v. Preston, Channell, J., said that the case was very near the line, but if in that case the prisoner was within the limits of immunity - though barely so - it is difficult in logic or sense to see why R v. Wright should have been outside the limits - he was, after all, developing his defence in the face of alleged admissions which formed a substantial part of the prosecution case, whereas Preston, unincriminated by the fabricated parade did not need to make the imputation that the policeman "was guilty of misconduct independently of the defence or of the necessity for developing the defence" as Lord Alverstone, C. J., put it in the next case to be considered, that of R v. Bridgwater[1].

Lord Alverstone's words were spoken in the Court for Crown Cases Reserved in the case of R v. Bridgwater, where the point was whether the defendant might be cross-examined as to character because he alleged that he had acted under the directions of a detective called Moss, a prosecution witness. The defendant had been arrested while in possession of stolen property and he said in answer to the charge that he had acted under Moss's instructions. At the trial Moss was cross-examined as to whether he had not employed the defendant as an informer. Lord Alverstone said that the defendant was doing no more than developing his defence and seeking to substantiate it by means of admissions from Moss. It is submitted that this passage from the judgement nicely expresses a distinction which the Appeal Court has not invariably appreciated: "If the questions put to Moss had involved the imputation that he was guilty of misconduct independent-

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1) (1905) I k.B. 131

ly of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character." Indeed, if the attack had been in the sense of the concluding words, or, so to speak, gratuitous, character would have been let in - subject to the court's basic discretion which stands apart from the Criminal Evidence Act. This was the situation in R v. Steinie Morrison[1], where several matters were raised on appeal, but the sole one relevant here arises out of an attack on a prosecution witness suggesting that she kept a disorderly house. The Court of Criminal Appeal held that this cross-examination fell within the express terms of the Act and exposed the defendant to the risk of his past life being inquired into. The judgement, delivered by Lord Alverstone, makes plain what is permissible under the Act and what is not: "It had become a question of credibility: who was to be believed when one contradicted the other? It was clear her evidence was very important, as it was true, it destroyed the prisoner's alibi, and she might have been effectively cross-examined as to her memory, her opportunity of seeing the appellant, and so forth. But Mr Abinger was not content to do this, he made a violent attack on her character so as to discredit her evidence altogether, and he did it with his eyes open, and after consultation with his client."

Abinger's memoirs[2] deal with the case and criticise the law. He put the case of a prosecution witness who has been convicted of

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1) (1911) 6 Cr. App. R. 159 2) Forty Years at the Bar, p.48

perjury and asks: "Is counsel defending the man in the dock to allow such a witness to leave the dock uncross-examined as to his convictions for perjury, and thus delude the jury into belie eing he is a reliable witness?" There is undoubted substance in his plaint, but as the law stood, and stands, the decision of the Appeal Court was correct, because the attack on the witness was extraneous to the defence.

Understandably in the Australian case of Matthews v. R[1], where an accused charged with larceny as a servant alleged that his receipt of the money in question was made with the concurrence of the managing partner of the employer and as part of a "tax dodge", it was held that the effect of cross-examination of the managing partner to this effect was to throw away the statutory protection.

It is settled that a suggestion that successive remands were obtained by the police to enable them to fabricate evidence[2]; and that a confession was dictated by one police officer to another[3]; or the assertion of a complete "frame up" by the police[4], does mean that the conduct of the defence involves imputations on the character of the prosecutor or his witnesses. And in R v. Roberts (otherwise Spalding)[5]. The appellant had been charged with larceny and with failing to report and had been sentenced to two terms of six months with hard labour consecutively. At his trial he gave evidence that a woman with whom he had been living had during a quarrel threatened that she would have revenged on him by having him arrested. Posing the question whether this came within the statutory provision, Dar-

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1) (1973) WAR 110; 2) R v Jones (1923) 17 Cr. App. Rep. 117 3) R v Clark (1955) 2 Q.B. 469; (1955) 3 All E.R. 29; 4) R v Phillips (1963) NZLR, 855 at 857, see generally R v Dawson (1961) 106 C.L.R.1, at 11 per Dixon C. J., 5) (1920) 15 Cr. App. Rep. 65; see also R v McLean (1926) 19 Cr. App. Rep. 104; R v Dunkley (1927) 1 k.B.; R v Fisher (1964) NZLR 1063; The People (Att. Gen) v Havelin (1952) 86 I.L.T.R. 168

ling, J., said: "In the present case the imputation on the character of the woman was the whole substance of the defence, and all the cases seemed to show that it came within what the statute regarded as sufficient to enable the prisoner to be cross-examined as to his own character."

It is almost startling to find out that one of the authorities used to support the conclusion was R v. Preston[1]. As Darling J., observed, the allegation made by the appellant in R v. Roberts[2] was that the woman had determined to make a charge against the appellant which she knew to be false. By what possible exercise in logic could this misconduct be differentiated from that of the police inspector accused of trying to fabricate incriminating evidence - R v. Preston?. In R v. Roberts, the charge against the woman was "the whole substance of the defence", and on any view it was a much stronger case for preserving the prisoners immunity from revelation of his character than was in R v. Preston, where the prisoner was held entitled to be protected because the charge he made against the police inspector was, in the words of Channell, J., made "with reference to a matter which could not be said to be irrelevant."

Lord Hewart C. J., once said - R v. Jones[3] - that a clear line is drawn between words which are an emphatic denial of the Crown's

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1) (1909) I K.B. 568 2) (1920) 15 Cr. App. Rep. 65; (1920) 37 T.L.R. 69 3) (1923) 17 Cr. App. Rep. 117, at 120; see also R v Levy (1966) 50 Cr. App. Rep. 238; R v Tanner (1977) 66 Cr. App. Rep. 56

evidence and words which attack the character or conduct of the witness, but the imprecise nature of this distinction was immediately emphasised when he added: "It was one thing for appellant to deny that he had made the confession, but it was another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the inspector; that seems to be an attack on the character of the witness."

It is respectfully submitted that the same judge approached more nearly to the truth when he said: "It is not possible to lay down, even if it were desirable, as the authorities stand, a series of formulas or regulations on this matter."[1] "These cases", said Chanel, J., in R v. Preston[2], "are very often somewhat difficult to deal with", and I quite agree.

(VI) READING WORDS INTO SECTION 1 (f) (ii)[3]

In R v. Dunkley[4] Lord Hewart C. J., said that "It is not possible to lay down, even if it were desirable, as the authorities stand, a series of formulas or regulations on this matter". Though these words were spoken many years ago, they are still true today - a fact which is amply demonstrated by a consideration of the authorities on the subject of adding gloss to the last part of Section 1 (f) (ii). One important question that needs to be considered now is whether it can be said that the accused is only exposed to cross-examination concerning his record when the nature or conduct of the defence is such as to involve "unnecessary" or "unjustifiable" imputations upon

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1) R v Dunkley (1927) I K.B. 323 at 330 2) (1909) I K.B. 568
3) See Ss 141 (f) (ii) and 346 (f) (ii) of the 1975 Scotland Act; S.399 (e) (ii) 1958 Crimes Act - Victoria; S. 159 (d) (ii) Nigerian Evidence Act 4) (1927) I K.B. 323 at 330

the character of the prosecutor or the witnesses for the prosecution. If the answer is negative the prisoner who alleges that it was not he, but a crown witness, who committed the crime charged, that the prosecutrix who asserts his guilt of rape was a consenting party of acts of immorality or that the man he assualted was the aggresor will be unable to develop his defence without throwing his shield away.[1]

Initially this question was answeed in the affirmative; it will be recalled for example that in R v. Bridgewater[2], it was held that a suggestion that someone found in possession of stolen property acquired it under instructions from the police did not amount to imputation on the character of the prosecutor or his witness. And in R v. Preston[3], the suggestion that an identification parade had been unfairly conducted was held not to amount to an imputation within the provision.

An emphatic negative was however the reply given to the question by a full Court of Criminal Appeal in R v. Hudson[4], - a prosecution for larceny to which the defence was that the crime had been perpetrated by a Crown witness. Lord Alverstone, C. J., disposes of the matter in the following passage from the judgement of the Court:- "We think that the words of the section, 'unless the nature or conduct of the defence is such as to involve imputations, ...' must receive their ordinary natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably' or 'for the purposes other than that of developing the defence', or other similar words."

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1) See Cross On Evidence, 5th ed. - at p.431 2) (1905) I K.B. 131 3) (1909) I K.B. 568 4) (1912) 2 K.B. 464; Decisions to the same effect are R v Cohen (1914) 10 Cr. App. R. 91; R v Bishop (1975) Q.B. 274; (1974) 2 All E.R. 206; R v Jenkins (1945) 31 Cr. App. Rep. 1; R v Pollinger (1930) 22 Cr. App. Rep. 75. See also The People (Att. Gen.) v Coleman (1945) I.R. 237; The People (Att. Gen.) v Denis Bond (1966) I.R. 214

Another decision to the same effect is R v. Sargron[1]. In that case, S. and D. were indicted with assualting G. with intent to rob him. Their defence was that they saw G. and V. steal an article and chased and stopped them with the object of making them return the article to its owner, whereupon G. offered them money to avoid apprehension. G. and V. denied this allegation. The judge permitted the prosecution to cross-examine S. and D. as to their previous convictions for dishonesty, saying: "I must ask myself this question: if I were to admit (this evidence) would the prejudice thereby created be disproportionate, to its evidential value ... I cannot conceive that this trial can be a fair one from the point of view both of the defence and the prosecution if the jury are kept in ignorance of the character of the accused ..." On appeal it was held that it was not for the court to substitute its discretion for that of the judge unless satisfied that he was wrong in principle. It seemed to the court that it was necessary if the trial was to be fair to the prosecution as well as the defence that the jury should know that S. and D., who were suggesting that they were honest persons anxious to prevent crime and that G. and V. were thieves whom they had caught red-handed, had recently been guilty of dishonesty. The Court of Appeal also pointed out that the Criminal Evidence Act 1898 Section 1 (f) (ii) provides for the admission of such evidence and R v. Flynn[2] does not lay down anything more than a general rule. The general rule laid down in R v. Flynn is that where "the very

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1) (1967) 51 Cr. App. R. 394 2) (1963) I Q.B. 729; (1961) 3 All E.R. 58

nature of the defence necessarily involves an imputation against a prosecution witness or witnesses the discretion should be, as a general rule, exercised in favour of the accused, that is to say, the evidence as to his character or criminal record should be excluded." The facts of that case were not dissimilar from that of R v. Sargvon. The accused, charged with robbery, alleged that the prosecutor had committed an offence of indecency against him and handed the money to him voluntarily as "hush money". The imputation against the prosecutor's character was no more and no less necessary in that case than in the case of R v. Sargron. One could rightly and properly querry why then was the general rule not applicable in the case of R v. Sargron? The answer would appear to be that the appellants set themselves up as "honest persons anxious to prevent crime". Had they not then given evidence of good character within the meaning of the proviso so as to let in evidence of their bad character under a different head? I think they had.

And in R v. Kassem[1], Kassem was alleged to have stolen a purse from a young girl. When approached by the police he attacked the girl's character and repeated the attack at his trial. The judge gave leave for Kassem to be cross-examined about his previous convictions. Relying on R v. Flynn[2], he appealled on the ground that the judge was wrong to give leave. The Court of Appeal held that the attack was not necessary to the defence and R v. Flynn did not apply. It was held that the judge exercised his discretion properly and the appeal was accordingly dismissed.

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1) (1968) Crim. L. R. 331 2) (1963) 1 Q.B. 729; (1961) 3 All E.R. 58

The leading Australian decision has been that of the High Court in Curwood v. R[1]. Both in that case and in the later Australian decisions[2], the approach has been to grapple with the difficulties of construction of the section, rather than fall back on the exercise of discretion to meet the problem raised by the operation of the counterpart of Section 1 (f) (ii)[3]. In Curwood v. R, a case on the earlier counterpart of Section 399 (e) (ii) of the Crimes Act 1958, it was held that a confession was extorted by threats and physical violence on the part of the police officers who gave evidence rendered the accused liable to be cross-examinaed as to his previous character. It was pointed out by Dixon, J., however that: "There is much authority to show that a denial by the prisoner of incriminating facts, notwithstanding the clear implication must be that the witnesses for the Crown are lying does not 'involve' an imputation. Further, it makes no difference that the denial is vigorous and even disparaging in its expression or that the imputation of deliberate untruthfullness is explicit."[4]

In the same judgement, Dixon, J., drew a distinction between on the one hand. the denial of the facts evidentiary or ultimate, and on the other hand, the setting up of a defence the basis of which is misconduct imputed to witnesses.[5]

In the later case of Dawson v. R[6], the same judge held that the trial had erred, both in ruling that Section 399 (e) (ii) applied, and in his exercise of discretion. He denied any knowledge of the

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1) (1944) 69 C.L.R. 561 2) R v Brown (1960) V R 382; R v Clark (1962) V R 657; R v Crawford (1965) V R 586; R v Heydon (1966) I NSWR 708
3) See S. 399 (e) (ii) of the Crimes Act 1958 - Victoria 4) (1944) 69 C.L.R. 561 at 587 5) Ibid at 588 6) (1961) 106 C.L.R. 1; (1962) ALR 365

crime, denied admissions alleged by the police officers and claimed that a record of interview produced contained much more than the few questions he had in fact been asked. Dixon, J., re-affirmed his view of the phrase in the proviso as follows:- " ... when you stop to consider the significance of the hypothesis demanded by the words 'when the nature or conduct of the defence is such as to involve imputations on the character of the witnesses for the prosecution' it becomes plain at once that what is referred to is not a denial of the case for the Crown, not a denial of evidence by which it is supported, but the use of matter which will have a particular or specific tendency to destroy, impair or reflect upon the character of the prosecution or witnesses called for the prosecution, quite independently of the possibility that such matter, were it true, would in itself provide a defence. The phrase assumes that denial of the case for the prosecution, although the evidence of the prosecution is necessarily contradicted, does not carry with it an imputation of the kind to which the provison refers. Further the word 'involves' refers to what is a part of the defence or at all events, an element or ingredient in the defence or what arises from the manner in which the defence is conducted. It is not meant to cover inferences, logical implications or consequential deductions which may spell imputations against the character of witnesses"[1].

It is quite settled that when, on a charge of rape, the defence allege that the prosecutrix consented to the intercourse, cross-examination of the accused on his previous convictions or bad

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1) (1961) 106 C.L.R. at 9

character is not justified by the statute[1]. This rule can be, and has been explained in two ways: first, one of the essential ingredients of the crime of rape, to be proved by the prosecution, is the absence of consent on the part of the prosecutrix. On this ground it may be said that, although to suggest that the prosecutrix consented is in the ordinary sense an imputation on her character, it is not such an imputation as is intended by Section 1 (f) (ii). Alternatively the rule can be explained on the ground that, though the defence of consent involves an imputation, it has now been settled how the judicial discretion existing under the section shall be exercised[2].

In R v. Turner[3], the question which fell to be decided was whether an accused charged with rape lets in cross-examination as to his character if his defence is that the complainant was a consenting party. This very question had been left open in R v. Preston[4], and a court of five judges was convened to consider the case of R v. Turner[5]. At his trial the accused had said that the complainant had consented and that she had taken hold of his penis. The Court of Criminal Appeal held that this cross-examination fell within the express terms of the Act and exposed the defendant to the risk of his past life being inquired into. The judgement delivered by Ludge's view, it is hardly surprising that he permitted cross-examination of the accused as to a previous conviction for assualt with intent to ravish. It is right to say that the trial judge had to rule a

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1) R v Turner (1944) K.B. 463, C.C.A; R v Clark (1955) 2 Q.B. 469 at 475; R v Cook (1959) 2 Q.B. 340 at 347 2) R v Cook (1959) 2 Q.B. 340
3) (1944) K.B. 463; see also R v Webster - (New Zealand Court of Appeal, unreported 6 June 1973). 4) (1909) I K.B. 568 5) (1944) K.B. 463; (1944) 1 All E.R. 599

question to which previous judicial answers had been in conflict. Thus in R v. Fisher[1], Day, J., had decided that where the accused alleged that the complainant had consented he could be cross-examined as to character, but in R v. Sheean[2] Jeff, J., had refused to follow this decision and had held that where consent is raised as a defence character is not thereby let in. In R v. Turner Humphreys, J., delivering the judgement of the Court of Criminal Appeal, pointed out that on a charge of rape there had to be proved (a)intercourse and (b)non-consent of the woman, and he then said: "What is commonly referred to as the defence of consent in rape is in truth nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which introduces the question of consent or non-consent. Can the legislature have intended to penalise the accused who avails himself of the right to give evidence conferred by statute by enacting that he may be cross-examined as to previous convictions if he denies one, though not if he only denies the other of the two ingredients of the crime?"[3]. He added that the accused's allegation that the complainant had handled his penis - described by the trial judge as an allegation that she had "committed an act of gross indecency upon him, indecently assualted him" - did no more than state details of the complainant's conduct showing that the act of connection was not against her will. Humphreys, J., concluded by expressing the opinion that the case was one in which "the court is justified in holding some that some limitation must be placed on the

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1) (1899) 43 L.J. (News) 100, Day J; The Times; January 31, 1899
2) (1908) 21 Cox C.C. 561 Jeff J; (1908) 72 J.P. 232 3) (1944): I All E.R. 599 at 601

words of the section since to decide otherwise would be to do grave injustice never intended by Parliament."

It is possible to argue, by analogy with the defence of consent to a charge of rape, that certain other defences to other charges should be capable of being raised without exposing the accused to cross-examination as to previous convictions, although such defences necessarily imply something to the discredit of a prosecution witness. A defence capabale of such analogous treatment would be one which amounts to a denial of some aspect or ingredient of the offence charged as to which the prosecution has the burden of proof. A decision that the raising of the defence does not justify cross-examination under the statute could be explained by methods similar to the explanations mentioned earlier for the case of rape. Two defences which might be so treated are, first, consent as a defence to indecent assualt (other than on a girl under sixteen or on a woman whom the accused knows or has reason to suspect to be a defective - in which cases consent is no defence)[1]. The burden lies on the prosecution to prove the absence of consent. Second, is self-defence as a defence to assualt, wounding etc. Where this defence is raised, the jury must acquit if on the whole of the evidence they are left in doubt whether the accused may have acted in self-defence[2].

In Scotland, it is clear that in relation to the special defences of alibi, self defence and incrimination, the persuasive burden of proof remains on the Crown and the only duty on the defence is to

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1) Sexual Offences Act, 1956, S. 14 (2) (3) 2) R v Lobell (1957) I Q.B. 547 C.C.A.

discharge the evidential burden of raising the issue in such a way that it has to be left to the jury. It is for the judge to consider whether the evidential burden has been satisfied, ie., whether there is evidence before the jury which could leave them in reasonable doubt on the matters in question. If he decides that that burden has been satisfied, then the only burden remaining in issue is the burden of proof lying on the prosecution, which includes the burden of proving to the jury beyond reasonable doubt that the plea of alibi, self-defence or incrimination is unfounded[1]. It is thought that the effect of the decision in Lambie v. H. M. Advocate[2], is of pertinence, though this case is as to the special defence of insanity. The court said in that case that " ... the passage in Walkers' Law of Evidence, Section 83 (b), to the effect that 'when a special defence is stated by the accused, the onus of proving it is upon him' can now be regarded as an accurate statement of the law only in the case of the plea of insanity at the time."[3] It is now hoped that the statement in Walker and Walker shall be confined as stated in Lambie's case to cases of insanity only; that way, the Scottish rule will be brought in line with its English counterpart. If the statement in Walker and Walker were still to be applicable, it is clear that the jury would not acquit if they were in doubt as to whether the accused acted for example in self defence, since the onus of proving the special defence would have been on him.

It is true that the prosecution need not anticipate this line of defence by adducing evidence to negative self defence in the first

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1) Cf R v Abraham, (1974) Crim. L.R. 246 2) (1973) J.C. 53
3) Ibid at p.58

instance, and consequently, that if the defence leads no evidence directed to the issue of self defence, a conviction may be proper although the prosecution evidence did not deal with that issue. But, the issue once raised, the burden lies on the prosecution, and to that extent the analogy with the defence of consent on a charge of rape holds good. Moreover, the accused is asserting that what he did constituted, in the circumstances, no offence, thereby, as in the case of rape, denying the prosecution case. It seems clear that in cases where the defence is able to elicit from the Crown witnesses sufficient evidence to raise the issue, the accused need not go into the witness-box. It is thought that the courts would not now adhere to what has been said to be the "principle"[1] that a defence of self-defence can succeed only where the accused himself gives evidence.

In cases of homicide the allegation that the killing was provoked by the deceased or was in self-defence does not raise any problem under Section 1 (f) (ii), for the deceased is not the prosecutor[2] or witness. A case could, however arise in which the lethal act of the accused, directed at and provoked by A, accidentally killed B. If A gave evidence, the arguments above could be advanced to protect the accused from cross-examination under the section[3].

In R v. Biggin[4], the defence, on a charge of murder, was that the deceased had made indecent overtures to the accused and had violently attacked him, and that the killing was in self-defence. The Court of Criminal Appeal, quashed a conviction of manslaughter on the ground

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1) Blair v H M Advocate (1968) 32 JCL 48, per L. J. C. Grant
2) R v Biggin (1920) I K.B. 213 3) Supported in a case of provocation, by Woolmington v D.P.P. (1935) A.C. 462; Chankau v R (1955) A.C. 206; Bullard v R (1957) A.C. 635; See also Cross, 75 L.Q.R. at 179
4) (1920) I K.B. 213

that, the deceased not being the prosecutor, cross-examination of the accused under Section 1 (f) should not have been permitted. In R v. Clarke[1], however, Lord Goddard C. J., giving the judgment of the Court of Criminal Appeal, found another explanation of R v. Biggin. Having justified the rape cases on the ground that the defence of consent is but a denial of the essential ingredient of the offence charged, he said: "That also, I think, may be the explanation of R v. Biggin ... the prisoner was relying on provocation or self-defence, and the facts had to come out. Somebody had to explain why the attack took place, and until that was explained and why people should have been in the same room, and why there was a fight, it was impossible for any defence to be developed at all."[2] The alternative explanation is in fact offered though not clearly, in R v. Biggins itself[3].

On the other hand, in R v. Cunningham[4], provocation was the defence to charge of malicious wounding. The substance of the provocation alleged was an invitation to homosexual conduct. The accused was convicted after cross-examination as to his previous convictions. The Court of Criminal Appeal dismissed an appeal, holding that provocation is not a defence to a charge of wounding. Lord Parker, C. J., thought though it was unnecessary to determine the question, that: "even if provocation was a proper defence, a question such as was put in this case must of necessity bring in the character of the prisoner."

R v. Turner[5] was mentioned with approval by Lord Simon in Stirland

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1) (1955) 2 Q.B. 469 - 2) Ibid at 475; see also Devlin J., in R v Cook (1959) 2 Q.B. 340 at 344-345; R v Brown (1960) 44 Cr. App. R. 181 3)(1920) I K.B. 213 at 221 4) (1959) 1 Q.B. 288 at 290 5) (1944) K.B. 463

v. Director of Public Prosecutions[1] and the fourth of the propositions with which he concluded his speech was that: "An accused is not to be regarded as depriving himself of the protection of the section because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses."[2]

But how on earth can this be made to fit with the decision in R v. Hudson?[3]. What could be more contradictory than Lord Simon's use of the verb 'necessitates' and the express declaration in R v, Hudson that the adverb 'unnecessarily' must not be tacked on to the statutory provision?

All the English cases were thoroughly reviewed by the House of Lords in Selvey v. Director of Public Prosecutions[4]. The House of Lords rejected an argument that R v. Hudson and the cases that followed it were wrong in their strict construction of Section 1 (f) (ii). The case is important both because of the attempts made in it to provide a cogent rationale from the difficult and sometimes conflicting decisions on the topic, and because it affirmed the existence and nature of the discretion accompanying the operation of the section. It is submitted that the speeches of the other Lords are entirely consistent with the four propositions which Viscount Dilhorne set out in his speech. He regarded these propositions as finally established by the cases: "(1) The words of the statute must be given their ordinary natural meaning ... (2) The section permits cross-examination of the accused as to character both when imputa-

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1) (1944) A.C. 315; (1944) 2 All E.R. 13 2) (1944) A.C. 315; for interpretation of Lord Simon's Fourth proposition see Per Dixon J in Curwood v R (1944) 69 C.L.R. at 588 3) (1912) 2 K.B. 464 4) (1970) A.C. 304; see also R v Jessop (1974) Tas. SR. 64; Cushing v R (1977) WAR 7

tion on the character of the prosecutor and his witnesses are cast to show their unreliability as witnesses independently of the evidence given by them and also when the casting of such imputations is necessary to enable the accused to establish his defence ... (3) In rape cases the accused can allege consent without placing himself in peril of cross-examination. This may be because such cases are sui generis[1], or on the ground that the issue is one raised by the prosecution ... (4) If what is said amounts in reality to no more than a denial of the charge, expressed, it may be, in emphatic language, it should not be regarded as coming within the section ..."[2]

The decision firmly established the existence of the discretion in the trial judge to modify the operation of Section 1 (f) (ii), which does not contain an express grant of discretion as in most of its Australian counterparts.

However the formulation by Viscount Dilhorne[3] leaves it uncertain whether rape is altogether exceptional, or whether the same reasoning extends to other offences in which the absence of consent is a necessary ingredient. Proposition 4 leaves the court considerable room for manoeuvre when drawing the line between an emphatic denial and an imputation. Even so, Viscount Dilhorne's statement of the law might be thought capable of being very oppresive to accused persons for whom a successful defence necessarily involves making imputations, were it not for the existence of a general discretion to disallow cross-examination despite its permissibility under Section 1 (f).

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1) R V Cook (1959) 2 Q.B. 340 at 347 (1959) 2 All E.R. 97
2) (1970) A.C. 304 at 339 3) Selvey v D.P.P. (1970) A.C. 304 at 339

R v. Nelson[1] is a pertinent case in the application of propositions 2 and 4 as set out by Viscount Dilhorne. In that case, the appellant who had a very bad criminal record, was charged with arson. The prosecution case rested largely on evidence of a police constable of an interview in which the appellant had, according to the constable made a full confession of guilt. Counsel for the appellant put it to the constable that that conversation had never taken place and, by implication, his notebook was unreliable. The Crown then applied to cross-examine the defendant on his previous convictions under Section 1 (f) (ii) of the Criminal Evidence Act 1898. This was allowed and the appellant was convicted, after a retrial, on a majority verdict. On appeal the question was whether in the language of the section, the cross-examination of the constable, taken with the appellant's denial in his evidence in chief of the interview created the situation which involved imputations on the character of the prosecution witness. The court held that - (1) (a) proviso (ii) of section 1 (f) of the Criminal Evidence Act 1898 permits cross-examination of an accused as to character both when the imputations on the character of the prosecutor and his witnesses are cast to show their unreliability as witnesses independently of the evidence given by them and also when the casting of such imputations is necessary to enable the accused to establish his defence; (b) but if what is said amounts in reality to no more than a denial of the charge, expressed, it may be, in emphatic language, it should not be regarded as coming

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1) (1978) 68 Cr. App. Rep. 12

within Section 1 (f) - the above two propositions (a and b) should be regarded as complimentary and mutually exclusive; (2) in the present case there was no attempt to demonstrate the constable's unreliability as to the disputed interview based on any matter independent of his evidence and the cross-examination of the constable was only directed at supporting the appellant's denials of the content of the disputed interview: it was not directed at casting imputations to establish a defence, the constable's notebook being merely used to refresh his memory and was not evidence in the case; accordingly, the judge had been wrong in law in allowing the appellant's criminal record to be put to him, which amounted to a material irregularity in the course of the trial; further, in view of the fact it was a retrial, a majority verdict and the fact that the alleged interview between the constable and the appellant was the only direct evidence of his involvement in the offence charged, the case was not one for the application of the proviso to Section 2 (i) of the Criminal Appeal Act 1968, and the appeal would be allowed and the conviction quashed.

But the Scottish approach to the statute in any case differs from the English as the case of O'Hara v. H. M. Advocate[1] shows. In that case a distinction was drawn between imputations which are necessary to enable the accused fairly to establish his defence, and imputations on the general character of the witnesses: the first do not deprive the accused of the protection of the prohibition, but the second may, in the judge's discretion, do so. In the case, the

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(1948) S.C. (J) 90; (1948) S.L.T. 372

defence of an accused tried on a charge of assualting two constables was that he had acted in self-defence and under provocation and a cross-examination of the constable was directed to show that one of them had been under the influence of drink and had been the aggresor. It was held that, since the cross-examination was necessary to enable the accused to establish his defence and was not an attack on the general character of the constable, the accused had not exposed himself to cross-examination, as to previouss convictions and the conviction following upon such a cross-examination, quashed. It was further observed that it is always within the discretion of the judge to refuse to allow such cross-examination the fundamental consideration being that the trial judge should be a fair one. It is pertinent to refer to the observation made by the Lord Justice-Clerk Thomson, he said: "Accordingly in my judgement, the statute warrants a distinction being drawn between two sets of cases, however difficult it may be to say on which side of the line any particular case falls, and perhaps for that reason it is undesirable to attempt too rigid line of demarcation. Broadly, the two classes are (1) where the the cross-examination is necessary to enable the accused fairly to establish his defence to the indictment albeit it involves an invitation to the jury to disbelieve the witnessess so cross-examined in so far as they testify in support of the indictment, and (2) where the cross-examination attacks the general character of the witness. I should perhaps add as a corrollary that in the second class of case

difficulty will arise only where the imputation on the character of the witness is directed to credit. Subject to risks involved in adopting that course, questions directed to some matter like general quarelsomeness or looseness of morals, the matter will usually be decided by the presiding Judge on the issue of whether or not the evidence is relevant to the indictment. I should add further that, even within the comparatively limited class of cases where the nature or conduct of the defence involves imputations on character, it is still a question for the presiding Judge to decide whether cross-examination of the accused should be allowed. The fundamental consideration is a fair trial and there may be cases where the price which the accused may be called upon to pay if cross-examination will be out of all proportion to the extent and nature of the imputations cast on the witnesses who testify against him"[1].

It is interesting to note that in the House of Lords decision in Selvey v. Director of Public Prosecutions[2], all the opinions delivered, except that of Lord Guest, contained adverse criticism of the judgement of Lord Justice-Clerk Thomson in O'Hara's case. It should however be pointed out that Lord Justice-Clerk Thomson's judgement had previously found some favour with some English commentators[3]. The majority in the House of Lords in Selvey's case attacked Lord Thomson's conclusion on two grounds. First, it was argued by Viscount Dilhorne[4] that "if the statement of Lord Alverstone in R v. Hudson[5] that it is not legitimate to qualify the words of the statute by adding or inserting the words 'for any purpose other than

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1) (1948) J.C. 90 at 98-99; see also Lord Jamieson at p.101
2) (1968) 2 All E.R. 497; (1970) A.C. 304 3) See J. D. Newton in (1956) Crim. L.R. 241 4) (1968) 2 All E.R. 497 at 507 5) (1912) 2 K.B. 464

that of developing the defence' be accepted it does not seem ... that the Lord Justice-Clerk's classification can be right." Against this it can be said that Lord Thomson did not add or insert anything, except in so far as every decision which involves the construction of a statute involves an explanation of its meaning. Secondly, Lord Pearce [1] feared that Lord Thomson's view would be to provide an over-liberal shield for an accused and might be unfair to the prosecution, since there "would be no limit to the amount of mud which could be thrown against an unshielded prosecutor while the accused could still crouch behind his own shield", provided that the abuse was linked up to the defence put forward. It is however simply not true to say that the defence has or ever has had complete freedom in this respect.

Furthermore, the metaphor of the shield is misleading in so far as it conveys the impression that the trial is a battle in which the accused is provided with a shield which protects him from the most dangerous kinds of attack on his credibility, which has, however already been undermined by the fact that a charge has been brought against him by a public prosecutor who is independent of the police[2].

In view of the accused's already impared credibility, and in the context of an accusational procedure in which the accused's record and character are not normally disclosed until a finding of guilt has been made, Lord Thomson's judgement provides, it is submitted, at least in the context of Scottish criminal procedure, the most

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1) (1968) 2 All E.R. 497 at 522 2) See John Grahame, Nov., 3, 1712, quoted in Hume II. 10; see also Lord Kilbrandon, Other people's Lat at p. 62

convenient solution to the problem set by Section 1 (f) (ii) of the 1898 Act.

The decision in O'Hara v H M Advocate[1] was followed in Feilding v. H M Advocate[2]. In that case, during the trial of an accused on charges of exorting money by threats, the victim of the extortion gave evidence for the prosecution that in the course of a telephone conversation he was threatened that, if he did not hand over the sum of money demanded he would be assualted and robbed in the same manner as had happened on a previous occasion. There was evidence linking the accused with the telephone conversation, but there was no evidence linking him with the previous assualts. In cross-examining the victim of the crime, the agent for the accused, ostensibly for the purpose of attacking the credibility of the witness on that previous assualt, sought to elicit from him that on the occasion concerned he had engaged in some unlawful activity. This he denied and no evidence was led to support the allegation. The prosecutor having cross-examined the accused as to his previous convictions, the court held that the questions put to the prosecution witness in cross-examination were not necessary in order to enable the accused to establish his defence and that, in view of the nature of the cross-examination, the prosecution was entitled to put the accused's own charcater in issue.

Having seen the position in England as contained in the propositions in Selvey v. Director of Public Prosecutions[3], and the position in Scotland as put forward by Lord Justice-Clerk Thomson in

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1) (1948) J.C. 90 2) (1959) J.C. 101 3) (1970) A.C. 304

O'Hara v. H M Advocate[1], it is significant to note that the Criminal Law Revision Committee recommended that Selvey's case should be overruled, and that the accused would lose his shield only if the main purpose of casting the imputations was to discredit the prosecutor or his witnesses and not directly to further the defence of the accused[2]. In other words, where the injurious reflections are not more than consequential upon or incidental to the due presentation of the accused's denial of the incriminating facts, the case will fall under Lord Simon's fourth proposition formulated in Stirland's case[3], read as it should be with reference to the case he mentions - R v. Turner[4]. The Thomson Committee endorsed the principle enunciated in O'Hara v. H M Advocate and observed that the effect of the recommendations of the Criminal Law Revision Committee seems to be to bring the law in England into line with the position in Scotland.[5] That appears to be true; but as Sherrif Macphail rightly pointed out: "it does not follow that the wording of the second limb of proviso (f) (ii) should not be altered[6]. Sheriff Macphail continued by observing that: "It may be said that the distinction in O'Hara does not follow from the ordinary and natural interpretation of the words of the section, and that in order to arrive at the distinction it is necessary to qualify these words by adding or inserting the words 'unnecessary' or 'unjustifiably' or 'For the purpose other than that of developing the defence' or other similar words.[7] It is thought, accordingly, that in any restatement of the law a provision equivalent to the second limb of proviso (f) (ii) should be phrased in such a way as to incorporate the principles in O'Hara.[8]

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1) (1948) J.C. 90 2) C.L.R.C. paras. 119-130 3) (1944) A.C. at p.327 4) (1944) K.B. 463 5) Thompson, paras 50:21 - 50:25 6) See Sheriff Macphail Research Reports - §5:56 7) Cf R v Hudson (1912) 2 K.B. 464, Lord Alverstone C.J. at pp 470-471; 8) Sheriff Macphail Research Papers - §5:56

Sherrif Macphail then went on to enumerate some of the inherent problems of the suggestion, he said: "It must be recognised, however, that even a provision in such terms would represent, as did Section 1 (f) of the 1898 Act, a somewhat unsatisfactory compromise between the treatment of the accused in every respect as an ordinary witness and the complete prohibition of any cross-examination of the accused about misconduct otherwise admissible in evidence. Lord Justice-Clerk Thomson said that the principle seems to be that it is unfair that an accused with a bad record should stand safe in the box while blackguarding the witness who testify against him[1]. It would certainly be unsatisfactory if, respectable witnesses were to be subjected to unfounded accusations by an accused whose record could not be disclosed: such people might be unwilling to act as witnesses, or might feel a deep sense of injustice if they did so act, only to be unjustly impugned in the witness-box. On the other hand, the present law permits an accused to make unfounded attacks on witnesses with impunity, so long as he does not go into the witness-box himself. The law also permits the defence to attack the character of murder victims[2] and other dead victims of crime, and to ask questions with a view to establish the bad character of persons who have not been called as witnesses[3]. Another difficulty is that the present law has the effect of deterring an accused with a record from attacking prosecution witnesses who themselves have had records and whose credibility may be suspect; and there is no equivalent rule

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1) O'Hara v H.M.A., (1948) J.C. 90 at 98 2) H.M.A. v Grudins (1975) SLT (Notes) 10 3) See R v Lee (1976) I W.L.R. 71

deterring the prosecution from attacking defence witnesses. It may be supposed, however, in the light of the experience of the two Committees, that it is not easy to formulate any less unsatisfactory rule."[1] In conclusion, may I say that though no wholly satisfactory solution of the problems thrown up by Section 1 (f) (ii) of the 1898 Act has yet been found, there is no reason to abandon the search. To leave everything to the court's unfettered discretion, as the House of Lords advocate in Selvey, creates too much uncertainty[2]. Some guidance is necessary for the courts and the legal profession, and Lord Thomson in O'Hara has to my mind provided the nearest approach to such guidance.

(VII) CO-ACCUSED'S RIGHT TO CROSS-EXAMINE:-

Section 1 (f) (ii) is clearly intended to allow cross-examination by the prosecution, but it is not obvious that cross-examination by a co-accused should be allowed simply because the accused in the witness-box has attacked the character of the prosecutor or the prosecution witnesses. The court's tentative view seems to be, that the judge may in his discretion allow an accused to cross-examine another under Section 1 (f) (ii) where the former has been prejudiced by the latter's evidence. In other words when one or two or more co-accused casts imputations on the prosecutor or his witnesses, the court should have the discretion to allow his co-accused to cross-examine him under proviso (f) (ii). That was held to be the law in R v. Lovett[3]. In that case Lovett was convicted of burglary and

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1) Sheriff Macphail Research Papers, § 5:57 2) B. Livesey, "Judicial discretion to exclude prejudicial evidence in Criminal Cases" (1968) CLJ 291 at pp. 301-309 3) (1973) I WLR 241

stealing a television set. He was tried with G. who was acquitted of handling the set. Lovett was interviewed by a police officer, E, and made a statement saying that he had stolen the set and that G had put him up to it. In evidence Lovett said that G. had claimed that the set belonged to him and asked him to recover it from the house where it was. Lovett also said that E had obtained the statement by threats of violence. G's counsel, assuming he was entitled to do so under Section 1 (f) (iii) of the Criminal Evidence Act 1898, and without giving any notice to the judge, cross-examined Lovett as to his previous convictions. Lovett submitted that the section did not apply because he and G. were not charged with the same offence[1]. Crown counsel submitted that there had been no injustice because it had been his intention, following the attack on E, to apply for leave to cross-examine Lovett as to his convictions, but he had been forestalled by G's counsel, and because G. was entitled as of right to cross-examine Lovett under Section 1 (f) (ii) of the Act. The Court of Criminal Appeal, dismissed an appeal holding that the proper practice was for counsel to tell the judge, in the absence of the jury, that he proposed to cross-examine an accused as to his convictions so that the judge could rule on the matter[2]. The court was aware of only one case[3], where the prosecution had been permitted to cross-examine under proviso (f) (iii), and knew of no case where a co-accused had based cross-examinantion on proviso (ii). Although a decision on the point was not called for, the Court inclined to the view that the judge having allowed G to cross-examine Lovett under

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1) Relying on R v Roberts (1936) 25 Cr. App. R. 158 and R v Russell (1971) 55 Cr. App. R. 23 2) See Murdoch v Taylor (1965) 49 Cr. App. R. 119 3) R v Seighley (1911) 6 Cr. App. R. 106

proviso (ii) as a matter of discretion; but G was not entitled to cross-examine as of right because it would follow that a co-accused who had not been prejudiced would have the same right. The trial judge not having been called upon to rule on the matter or exercise his discretion, the Court it was held would exercise its own discretion[1]. Whereas the view might be taken that Lovett's imputations against E did G no harm and it would not be fair to allow him to cross-examine Lovett, there could be no doubt it would have been proper to allow the prosecution to cross-examine him. It was held that in the circumstances the court would apply the proviso.

It should be noted that while the court may refuse leave to a co-acccused to cross-examine under proviso (f) (ii), it cannot refuse it to a co-accused under provios (f) (iii) as we shall soon find out in subsequent discussions.

(VIII) IMPUTATIONS AGAINST WITNESS FOR CO-ACCUSED:-

Sherrif Macphail[2] has suggested that the rule in O'Hara v. H M Advocate[3] should be extended to cover the case where the imputation is made against a witness for a co-accused. The Criminal Law Revision Committee formulated a clause the effect of which is that, whether the imputation is made by the accused (A) against a witness for the prosecution or against a witness for the co-accused (B), both the prosecution and B will be able to cross-examine the accused A who makes the imputation. This seems to the committee to be clearly right. In particular, they say, the fact that the prosecution may

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1) applying R v Cook (1959) 43 Cr. App. R. 138 2) Sherrif Macphail Research Papers § 5:59 3) (1948) J.C. 90

have refrained from cross-examining A should not prevent B from cross-examining him, especially if the witness against whom the imputation is made is more favourable to B than to A.[1]

(IX) THE DISCRETION AND THE DUTY TO WARN

When the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, the trial judge has a discretion to disallow cross-examination of the accused on his previous convictions or bad character. This discretion, though its existence had been observed earlier[2], was first stated and examined in a case on the second limb of Section 1 (f) (ii) in R v. Jenkins[3], and has since been re-aserted as an essential factor in the application of the section[4]. Even now, in cases in which the judge does not apply his mind to the question of discretion, the Court of Appeal may exercise to its own discretion as happened in R v. Cook[5]. In that case the appellant, had been charged with obtaining a motor car by false pretences and with receiving cheques. One of the prosecution witnesses was a detective constable who said that the appellant when charged, admitted that he had obtained the cash by means of a forged cheque. He had also made a written statement saying that he had found the cheque forms in a road. The appellant conducted his own defence and suggested to the detective constable that his statement had been obtained by means of a threat that if he did not speak his wife would be charged. In cross-examination he repeated this allegation, and counsel for the

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1) CLCR § 131 2) R v Watson (1913) 8 Cr. App. R. 249; Maxwell v D.P.P. (1935) A.C. 309 3) (1945) 31 Cr. App. R. 1 4) R v Clarke (1955) 2 Q.B. 469; R v Cook (1959) 2 Q.B. 340; (1959) 2 All E.R.97; R v Flynn (1961) 3 All E.R. 58 5) (1959) 2 Q.B. 340; see also R v Dennini (1972) 128 C.L.R. 114

prosecution indicated to the judge that he wished to put "certain further questions" to the appellant. The judge said that while counsel was, strictly entitled to do so he would have thought it would not be necessary. Counsel then put his criminal record to the appellant, and he was convicted. Cook appealed, and although in the event the appeal was dismissed under the proviso to Section 4 (i) of the Criminal Appeal Act 1907, the judgement delivered by Devlin J., came to grips with the problem involved in an impressive fashion.

It held that the defence had been so conducted as to involve an imputation on the character of the police witness, that the trial judge had a discretion whether an accused's character should be let in but that in the present case he had not exercised that discretion. After reviewing the authorities Devlin, J., said: "We have come to the conclusion that the questions ought not to have been put."

Devlin, J., having briefly mentioned the point about the discretion, recalled that it had been made again in Stirland v. Director of Public Prosecutions[1], and he said that it was just elaborated in R v. Jenkins[2]. Since R v. Cook[3] it is easier to see how the discretion should be exercised and the court's judgement is in accord with the words of Singleton, J., in R v. Jenkins: "The essential thing is a fair trial." Devlin, J., in R v. Cook said that the cases, particularly R v. Preston[4], R v. Jones[5] and R v. Clark[6], indicate the factors to be borne in mind, and he went on: "Is a deliberate attack being made on the conduct of the police officer

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1) (1944) A.C. 315; (1944) 2 All E.R. 13 2) (1945) 31 Cr. App. R.1
3) (1959) 2 Q.B. 340 4) (1909) I K.B. 568 5) (1923) 17 Cr. App. R. 117 6) (1955) 2 Q.B. 469

calculated to discredit him wholly as witness? If there is, a judge might well feel that he must withdraw the protection which he would desire to extend as far as possible to an accused who was endeavouring only to develop a line of defence."

The soundness of this seems to be confirmed by R v. Flynn[1]. The facts of the case were that the appellant had been convicted of robbing a Major X of money. His defence at the trial was that the major had made indecent suggestions to him and had indecently assaulted him, and that the money had been given to him as "hush money". The trial judge allowed questioning of the appellant as to his record. In the Appeal Court, Slade, J., had no hesitation in finding this to be wrong. The judgement contains these important words: "The exercise of a discretion must depend entirely on the facts of the particular case in which it falls to be exercised, but where, as in the present case, the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses the discretion should in the opinion of this court be as a general rule exercised in favour of the accused ... . If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter, so to speak, to an accused person to give evidence on oath in the witness-box would be a mere trap because he would be unable to put forward any defence, no matter how true, which involved an imputation on the character of the prosecutor, or any of his witnesses, without running the risk, if he had the misfortune of having a record, of his previous convictions being brought up in

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1) (1961) 3 All E.R. 58

court while being tried on a totally different matter."[1]. - (The Court refused to apply the proviso to Section 4 (1) of the Criminal Appeal Act and the conviction was quashed.) The above lucid exposition means that the discretion must be exercised in the accused's favour if he is doing no more than alleging misconduct connected with "the necessity for developing his defence".

It is true to say that the cases discussed suggest that the words of the statute must be construed literally, even in cases in which imputations are a necessary part of the accused's case, but that the judge should generally exercise his discretion to exclude cross-examination which is legally proper when imputations are an essential part of the offence Although the principles have been intelligibly laid down in R v. Cook[2] and R v. Flynn[3], their application in some of the later cases may not appear entirely happy. In R v. Davies[4], the charge was one of living on the earnings of prostitution. Three police officers gave evidence of observations, and defending counsel, after warnings from the judge, put it to them that they were lying, using such expressions as "completely and utterly untrue", "all lies", "not merely mistaken but positively untrue" and "fiction". The judge permitted cross-examination of the accused and he was convicted. At the appeal his counsel relied on Flynn's case. The court upheld the conviction and said the judge had properly exercised his discretion. It declared that the suggestion was not merely that the officers were lying but that they had put their heads together

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1) Ibid at 63 2) (1959) 2 Q.B. 340 3) (1961) 3 All E.R. 58
4) (1963) Crim. L. R. 192; 107 S.J. 78

and concocted a story which they knew was untrue. The decision seems open to the objection that had only one prosecution witness been accused of lying that accusation, even if in strong terms or "forcible language", would not have let in character, whereas an attack on more than one raises an inference of "concoction" and removes the defendant's protection. Would the defence retain immunity if it said in terms that no allegation of "concoction" was being made, although the imputation of lying to several prosecution witnesses where there was no question of mistake inevitably raised the inference of "concoction"? It is arguable that in R v. Davies, the welcome assertion of principle in Flynn was whittled down in a manner that does not as a matter of logic carry conviction.

Another decision which is open to criticism is R v. Weldon[1]. The appellant had been convicted of unlawful sexual intercourse with a girl of fifteen. She had given birth to a child whose father, she alleged, was the appellant. She was cross-exaimined with a view to showing that she had had intercourse with other men, and it was also put to her that she had said to a number of persons that she had a hold over her brother because she had had intercourse with him. The defence was a denial and the judge permitted questions to the accused about a previous conviction for indecent assault. The Court of Criminal Appeal supported this. It was inclined to the view that the nature of the defence necessarily involved putting it to the girl that she had had intercourse with other people, not to show that she was of loose character but that somebody else might be the father of

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1) (1963) Cr. L.R. 439

the child. But, continued the judgement, the questions regarding the brother suggested that she was a thoroughly immoral and also a criminal person and went further than was necessary from the nature of the defence. Now if it was proper to seek to show that someone other than the appellant was the child's father, "the evidence that she had had intercourse wit her brother would have had the same effect; and it is not clear why this should have been treated differently because of the fact that it happened to be an allegation of incest."[1] As to the assertion of the Appeal Court that the questions about the brother suggested she was a "criminal Person", it is relevant to observe that the Sexual Offences Act 1956, Section 11, provides that the offence of incest by a woman is committed only if she is aged sixteen years or more - the girl in this case was fifteen years of age.

However the dicta of R v. Cook[2] and R v. Flynn[3] were correctly applied in R v.Manley[4]. In that case Manley was convicted of housebreaking and larceny and burglary and larceny and sentenced to seven years' preventive detention. He appealed against conviction and sentence. His first ground of appeal against conviction was that the Assistant Recorder wrongly allowed the prosecution to cross-examine him as to his record which involved thirty-eight convictions. The chief prosecution witness, H., said that Manley woke him up in the night and handed him the stolen property. Manley admitted the visit but denied bringing any property. Counsel for Manley cross-

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1) Professor C.J. Smith in (1963) Crim. L. R. 440 2) (1959) 2 Q.B. 340 3) (1961) 3 All E.R. 58 4) (1962) 46 Cr. App. R. 235

examined H. on the basis that he was lying and suggested that he was lying because he wanted Manley out of the way of his (H.'s) wife and family, and also on the basis that he was an accomplice. The Assistant Recorder ruled that the putting of both these imputations entitled the prosecution to cross-examine as to character and when prosecuting counsel indicated that he proposed to do so said: "I do not see how I can possibly stop you having ruled that you are entitled to do so." It was argued that the Assistant Recorder did not deal with the matter as one of discretion but as one of admissibility, and erred in principle in exercising his discretion. It was held that although the Assistant Recorder did not say in terms that he was exercising his discretion it was clear that he was purporting to do so because during the submissions he refered to an authority directly in point. It was also held that so far as the exercise of the discretion was concerned, the questions put to H. suggesting he was lying had to be put since they were inherent in Manley's defence. And further, that the mere suggestion of a reason for the lie did not change the position at all unless the reason itself imputed some bad character or previous conviction. Here, however disagreeable it may have been to H. to have his private life refered to in public, it is no way suggested that he had been guilty of any disgraceful or criminal conduct. Accordingly if the matter remained there, there would be no ground for exercising the discretion in favour of allowing Manley to be cross-examined as to character. However the further questions to H. were clearly designed to

show that he was an accomplice because if that could be shown then, there being no corroboration, there was a very good chance of persuading the jury it would be unsafe to convict on H.'s evidence. That was going very much further than was necessary for the defence which Manley was putting up. It was the reverse of the position that arose in regard to the first imputation, because here the reason given for his lie was that he was an accomplice and guilty of a criminal offence. In these circumstances there was nothing wrong in principle with the manner in which the discretion was exercised.

The appeal against conviction was dismissed but the court varied the sentence to five years' imprisonment on the ground that despite his shocking record it was proper to do so pursuant to the Practice Discretion on Corrective Training and Preventive Detention[1] since he was only thirty-five and his longest sentence was three years' imprisonment. It is my view that the decision in this case involves further principles governing the exercise of the discretion than both Cook and Flynn. As we know by now, discretion should be exercised in favour of the accused where, simply by denying the truth of the prosecution's evidence he is alleging that the prosecution witness is a liar; whereas as in the present case if he alleges such a witness is an accomplice, for the purpose of requiring that his evidennce be corroborated, the discretion may be exercised against him. Though in the present case it was emphasised that the latter allegation is an allegation of criminal offence it is clear that not every allegation

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1) (1962) Crim. L. R. 308

of a criminal offence entitles the judge to exercise his discretion against the accused, for such an allegation may be essential to the very nature of the defence.

The position in England once again appears unsettled following the House of Lords decision in Selvey v. Director of Public Prosecutions[1]. In that case, though the House confirmed after full arguement, the existence of judicial discretion to prohibit cross-examination it denied the existence of a general rule that the discretion should be exercised in favour of the accused when the proper development of his defence necessitates the casting of imputations on the prosecutor or his witnesses. Selvey's conviction was accordingly affirmed. This to my mind negates the joint effect of R v. Cook[2] and R v. Flynn[3] which were generally thought to have put paid on the matter. While Cook's case makes it clear that it is not enough for the judge to rule that the questions which it is proposed to put to the accused are admissible in law, but that he must make it clear that he has considered whether he should not exclude them, notwithstanding their technical admissibility, and in the exercise of his discretion, has decided to admit them; it will be recalled that R v. Flynn established that the exercise of the judge's discretion is governed by principles; and that a failure to observe these principles in the exercise of the discretion will result in the conviction being quashed. In that case, the principle which was isolated was that, as a general rule, where the very nature of the defence necessarily involves an imputation against the prosecutor or

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1) (1970) A.C. 304 2) (1959) 2 Q.B. 340 3) (1961) 3 All E.R. 58

his witness, the discretion should be exercised in favour of the accused.

It is clear that in Selvey's case, their Lordships refused to fetter the discretion of the trial judge by any rules as to its exercise. The sole criterion to guide his decision is fairness to the accused. It is however significant to point out that Lord Guest, in the same case of Selvey, observed that one of the matters affecting the exercise of discretion would doubtless be the relevance of the imputation to the accused's case and the extent to which the accused pursued the allegation in the circumstances[1].

The position in Scotland is contained in O'Hara v. H M Advocate[2], in which it was held that it was a question for the presiding judge to decide whether cross-examination of the accused under proviso (f) (ii) should be allowed, and it was assumed that the prosecutor would always ask for leave to cross-examine.

In sustaining an objection for the defence and disallowing a question Lord Stewart in H M Advocate v. Grudins[3], voiced an unmistakable support for O'Hara's case. He said: "In O'Hara v. H M Advocate[4], it was assumed that the prosecutor would always ask for leave to cross-examine ... . As was said by Lord Justice-Clerk Thomson in O'Hara , 'even within the comparitively limited class of cases where the nature or conduct of the defence involves imputations on character, it is still a question for the presiding judge to decide whether cross-examination of the accused should be allowed.

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1) (1970) A.C. 304 at 352 2) (1948) S.C. (J) 90 3) (1976) S.L.T. (notes) 10 4) (1948) S.C. (J) 90

The fundamental consideration is a fair trial and there may be cases where the price which the accused may be called upon to pay if cross-examined will be out of all proportion to the extent and nature of the imputations cast on the witnesses who testify against him.' I would have no hesitation here in using my discretion in favour of disallowing the line of cross-examination. The prejudice which might be suffered by the accused would be out of proportion to the relevancy ..."

Sheriff Macphail has expressed the thought that it may be useful to include in any new provision a rule to the effect that all cross-examination under this provision may be undertaken only with leave of the Court, and it is always within the discretion of the judge to permit or refuse it.[1]

We can next turn to the position in Autralia. The Australian cases prior to Selvey's case contain a number of formulations of the principles upon which the discretion of the court should be exercised. The most comprehensive of these was the following made by Smith, J., in R v. Brown[2]: "(a) That the legislation is not intended to make the introduction of a prisoner's previous convictions other than exceptional. (b) That the prejudicial effect on the defence of questions relating to the accused's long criminal record needed to be weighed against such damage as his Honour might think had been done to the Crown case by the imputations. (c) That on the issue of credibility it might be unfair to the Crown to leave the Crown witnesses under an imputation while preventing the Crwon from bringing out

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1) Sheriff Macphail Research Papers, §5:60 2) (1960) V.R. 382 at 398 See R v Jessop (1974) Tas SR 64; R v Clarke (1962) VR 657 at 664 and Dixon C. J., in R v Dawson (1961) 106 CLR1 at 17

the accused's record. (d) That the actual prejudicial effect of the cross-examination, if allowed, might far exceed its legitimate evidentiary effect upon credit. (e) That great efforts had been made by the defence to make it clear that memory only and not honesty was the subject of the attack. (f) That counsel for the defence has not been warned but had been refused advice when he sought it from his Honour." Smith, J., concluded his judgement with the sentence: "I may observe that as R v. Cook shows, it is essential if accused persons are not to be unfairly restricted in putting off their defences that the courts should be most cautious and sparing in the exercise of the discretion to grant leave."

And in the recent case of Matthews v. R[1], Burt, J., made the interesting observation that in Victoria and Queensland the wording of Section 399 (e) (ii) is such that the discretion is to admit the cross-examination. In the other jurisdictions the discretion is to exclude the evidence. In most cases this difference would not be important.

There are some minor points worth mentioning. For instance the fact that the Court of Appeal may uphold the judges decision to allow cross-examination on a different ground from that upon which he relied[2] is worth a mention. And the general principle is that the Court of Appeal interferes only if the trial judge's discretion was exercised upon a wrong principle; this is demonstrated by the case of R v. Gunner and Lye[3]. In that case Lye approached S in a public

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1) (1973) WAR 110 at 117 2) R v Clark (1955) 2 Q.B. 469 at 473
3) (1977) Crim. L.R. 217

house while S was making a telephone call and asked him to go outside and have a word. Having finished his telephone call, S went outside. Lye made an unprovoked attack on him knocking him to the ground. Thereafter both Gunner and Lye kicked him. The defence case was that S had made an unprovoked attack on Lye, who acted in self-defence and Gunner had gone to his assistance. It was suggested that S's motive was revenge, he suspecting that Lye had stolen £15 from him some weeks earlier. It was put to S that he had been waiting for an opportunity to obtain his revenge for what he considered to be the theft of his money. It was put to another prosecution witness that he and S were lying and had conspired to commit perjury to achieve that revenge. The Crown successfully applied for leave to cross-examine Gunner and Lye as to previous convictions for violence. They appealed on the ground that the previous convictions were wrongly admitted. It was held dismissing the appeal that, the Recorder had approached the matter in entirely the correct way applying the decision in Selvey's case. He gave the jury a very proper direction on the caution they should apply in relation to the convictions and to their relevance. The cross-examination of Selvey clearly indicate imputations on his character in the ordinary, natural meaning of the words and the cross-examination of Gunnner and Lye as to their previous conviction was thus admissible in law. The Judge exercised his discretion when applied to for leave, and the Court of Appeal would interfere with that exercise only if it were based on some error in principle.

In R v. Cook[1], the Court of Criminal Appeal stressed the importance of giving some sort of warning to the defence that it was going too far. It was said that it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim to rights, or for the judge to give the defence a caution. This is especially needful when the prisoner is unrepresented[2]. The warning should not be in open court.[3]

Finally, it is necessary to point out that the fact that the existence of the discretion was not recognised in the early days of the Criminal Evidence Act is a matter to be borne in mind when the early decisions are under consideration. It is possible that some of them should now be treated as cases in which there was an imputation although the judge would have been justified in prohibiting cross-examination in the exercise of his discretion, had he known that he possessed such a thing. And not withstanding the decision in Selvey's case[4], I would like to think that if the accused has to make imputations against prosecution witnesses in the course of the proper conduct of his case there should be no question of permitting cross-examination as to his character. Only where the attack on the prosecution is gratuitous in the sense of not flowing naturally from the defence should the protection be lost.

(X) THE RATIONALE OF THE SECOND HALF OF SECTION 1 (f) (ii)

The rationale of the second limb of Section 1 (f) (ii) can be broadly classified or identified under two headings. The first is by

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1) (1959) 2 Q.B. 340 2) R v Carroll (1964) Tas. S.R. 76, discussing R v Coman (1955) VLR 289 (no rule of law or practice) 3) For the appropriate procedure at a summary trial see R v Weston-Super-Mare JJ; ex Parte Townsend (1968) 3 All E.R. 225n. 4) (1970) A.C. 304

reason of the adversorial system of justice. As we know, generally in the adversorial system, the prosecution always starts rather handicapped and it appears the rule is out to minimise or decrease this handicap or imbalance, by endeavouring to put both parties on equal footing. This is done for the sake of the system, as Lord Justice-Clerk Thomson observed in Thomson v. Glasgow Corporation[1]. He said: "It is an essential feature of the judge's function to see that the litigation is carried on fairly between the parties. Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administrating justice in civil affairs proceeds on the footing that each side, working at arm's length, selects its own evidence. Each side's selection of its own evidence may, for various reasons, be partial in every sense of the term. Much may depend on the diligence of the original investigators, or on the luck of finding witnesses or on the skill and judgement of those preparing the case. At the proof itself whom to call, what to ask, when to stop and so forth are matters of judgement. A witness of great value on one point may have to be left out because he is dangerous on another. Even during the progress of the proof values change, treasured material is scrapped and fresh avenues feverishly explored. It is on basis of the two carefully selected versions that the judge is finally called upon to adjudicate. He cannot make investigations on his behalf he cannot call witnesses; his undoubted right to question

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1) (1962) SC (HL) 36, at pp 51-52

witnesses who are put in the box has to be exercised with caution. He is at the mercy of contending sides whose whole object is not to discover truth but to get his judgement. That judgement must be based only on what he is allowed to hear. He may suspect that witnesses who know the 'truth' have never left the witness-room for the witness-box because neither side dares risk them, but the most that he can do is to comment on their absence ... . A litigation is in essence a trial of skill between opposing parties conduct under recognised rules, and the prize is the judges decision. We have rejected inquisitorial methods and prefer to regard our judges as entirely independent. Like referees at boxing contests, they see that the rules are kept and count the points."[1] It is no surprise following this statement that this is sometimes described as the sporting view.

The other rationale of the second limb of Section 1 (f) (ii) can be described as "truth" oriented. Here too, the idea as in the first rationale is to put both parties on equal pedestal, though this is not the main objective of the rule, that being just a direct by-product of the main objective which is to consider the credibility of the accused - i.e., his reliability after he might have cast aspersions on the character of the prosecution. As Channell, J , stated in R v. Preston[2]: "If defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct - not his evidence in that

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1) For a commentary on these observations see (1963) SLT (News) 21
2) (1909) I K.B. 568 at 575; see R v Westfall (1912) 7 Cr. App. R. 176 at 179 per Hamilton J.

case ... makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence."

Similarly in R v. Jenkins [1], Singleton, J., stated that: "The subsection was intended to be a protection to an accused person. A case ought to be tried on its own facts and it has always been recognised that, it is better that the jury should know nothing about an accused past history if that is to his discredit just as it was recognised that this was fair and proper, so it was recognised that if the nature or conduct of the defence was such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution it was equally fair and proper that the prosecution should have the right to ask questions tending to show that the accused has committed or been convicted of an offence other than that which is under investigation." In the same case Jenkins, J.,[2] observed as follows: "(I)n the ordinary and normal case (the judge) may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair the jury should have before them material on which they can form their judgement whether the accused person is more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused

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1) (1945) 31 Cr. App. R. 1 at pp. 14-15 2) Ibid at p.15

person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section." A view seemingly reinforced by Devlin J in R v. Cook[1], when he said: "If there is a real issue about the conduct of an important witness which the jury will inevitably have to settle in order to arrive at their verdict, then ... the jury is entitled to know the credit of the man on whose word the witness's character is being impugned." In other words, it is a matter of tit for tat as all the dicta unanimously indicates.

It is pertinent to point out that the question is not the intent with which the accused raised the matter but the likely effect on the mind of the jury.[2]

(XI) PURPOSE OF THE CROSS-EXAMINATION ALLOWED BY SECTION 1 (f) (ii)

It will be pertinent to recall the rationale of the provision in Section 1 (f) (ii) that allows an accused to be cross-examined as to his character when he has made imputations on the character of a prosecution witness is, as Channell, J., observed in R v. Preston[3], that " ... the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view to showing that he has such a bad character that the jury ought not to rely on his evidence."

It follows from this that the purpose of the cross-examination permitted by Section 1 (f) (ii) of the Criminal Evidence Act 1898, is

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1) (1959) 2 Q.B. 340 2) See R v Donnini (1972) 128 C.L.R. 114
3) (1909) I K.B. 568 at 575; see also R v Jenkins (1945) 31 Cr. App. R. 1 at 15

to discredit the accused, and the judge must use his best endeavours to make this plain to the jury. A good case in point is R v. Vickers.[1] In that case, the appellant Vickers was convicted of unlawfully and maliciously wounding A., a prison officer, at a remand home at which Vickers was at the material time on remand. He alleged in defence of the charge that he had been attacked by A and other prison officers and that any injury caused to A by the appellant was done in self-defence. The Deputy Chairman gave leave to the prosecutor to cross-examine Vickers as to his previous convictions under Section 1 (f) (ii). He was cross-examined in such a way to as to suggest that his convictions were evidence of a violent disposition. In summing up to the jury the Deputy Chairman said that the appellant's convictions for violence did not mean he must be guilty, his convictions were simply part of the evidence and the jury were to give them what weight they saw fit. The court held, quashing the conviction, that, this was not a satisfactory direction. The object of cross-examination under Section 1 (f) (ii) it was held, is really to affect the credit of the accused. It was observed that the direction of the Deputy Chairman set against the background of the appellant's cross-examination would appear to be a direction that the jury could consider his convictions as a disposition to violence.

The decision in this case is clearly in accordance with the above statement of Channell, J., in R v. Preston. The decision however has a further significance; it raises doubts whether the cross-examination as to convictions for violence ought to have been

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1) (1972) Crim. L. R. 101

admitted at all. It is not clear what bearing convictions for violence have upon untruthfulness. A man may have a very violent disposition generally and yet be very honest. Are persons with violent dispositions generally less truthful than other people? Unless they are, the evidence surely has no relevance at all for the purpose for which it may be admitted.

On the other hand, convictions for violence have, or may have, a high degree of relevance on a charge of an offence of violence. Whatever direction is given to the jury, it is difficult to suppose that they can infact ignore the conviction for the purpose for which it has high relevance, while taking it into account for the purpose for which it has little or no relevance. This is surely a case in which the prejudicial effect of the evidence outweighs its probative value, so that, even if it is admissible in law, it ought to be excluded in the exercise of the judge's discretion.

Another case in point is R v. Inder[1]. In that case the appellant was charged with one offence of buggery and with seven of indecent assault relating to six boys living in the same place where he lodged and three of them in the same house. He had a very bad record for similar offences and during the evidence of one boy, the appellant alleged that the evidence against him had been faked and that the boy had been blackmailing him. The trial judge ruled that the appellant had made an imputation of bad character against the boy and, therefore, under the proviso to Section 1 (f) of the Criminal

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1) (1977) 67 Cr. App. R. 143

Evidence Act, 1898, he allowed the appellant's bad record to be let in. During the summing up the judge did not exercise full caution to ensure that the jury were warned from time to time that the information about the appellant's bad character should be used for purposes of credit only. The crown case was that the evidence of similar fact satisfied the test laid down in Boardman v. Director of Public Prosecutions[1], in that the offences were strikingly similar, all committed during a period when the appellant was living in the same house as two of the boys and shared the same bed, and further, that the similarities represented the stock in trade of the seducer of small boys. The jury convicted on the one count of buggery and on four of the indecent assualt counts. On appeal on the question whether the trial judge had erred in allowing the appellant's past record of similar offences to be admitted in evidence and how far the evidence of each boy could be treated as corroborating the evidence of others, it was held that, first, the trial judge had not erred in admitting evidence of the appellant's past criminal record, despite its highly prejudicial nature; nevertheless, insufficient guidance had been given to the jury to treat that evidence as going to credit only and not as similar fact evidence, in respect of which it was clearly admissible. Secondly, it was held that evidence as to other similar offences was admissible as similar evidence if, but only if, it went beyond showing a tendency to commit crimes of that kind and was positively probative with regard to the offence charged, whereas the common factor of the instant offences were similarities which

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1) (1974) 60 Cr. App. R. 165; (1975) A.C. 421

represented the stock in trade of the seducer of small boys and were not unique. It was further pointed out that the judge should have directed the jury that the similarities were not sufficient to satisfy the test of similar fact evidence, and they should not have regarded the evidence of one boy as evidence against another; accordingly, the appeal was allowed and the conviction quashed.

It is pertinent to take a look at the suggestion of Sir Rupert Cross on the issue of direction to the jury. He pointed out that the judge is obliged to direct the jury in something like the following terms: "You must not infer from the fact that the accused has numerous convictions that he is guilty because he is the kind of man who would commit this crime but when considering the weight to be attached to his testimony to the effect that he did not commit this crime, you must remember that it is tendered less trustworthy than would otherwise be the case by the fact that he has numerous convictions."[1] Similar directions have been made in a number of cases. In R v. Morrison[2], the accused was charged with murder by violence, and his counsel cross-examined one of the witnesses for the prosecution on the question whether she kept a brothel. Morrison was accordingly cross-examined in his turn with regard to his previous convictions for larceny and burglary. Darling, J., told the jury that: "The only use to be made of these previous convictions is to show that when you have to rely on his (the prisoner's) word as contradicting something stated by somebody else, or something which

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1) An attempt to Update The Law of Evidence, pp 21-22 2) Cited from Notable British Trials in 11 C.L.J. at 388. The direction appears to have been approved by the Court of Criminal Appeal - R v Morrison (1911) 6 Cr. App. R. 159 at 169. Similar directions were given by trial judges, see report of the case of R v Falconer - Atlee (1973) 58 Cr. App. Rep. 349

is not corroborated, you have not the word of a person who has done nothing wrong .... You have only the word of a man whose past career has been what you know it to have been."

And in R v. Cook[1], where imputations were cast upon the method by which a confession was obtained, the judge told the jury he was sure that they would not be prejudiced by the fact that the accused admitted to having been convicted of criminal offences. Later he said this: "When allegations are made against police officers, or indeed any other witness for the prosecution, you should consider who is the person who is making them, and for that purpose you are entitled to take into consideration that he admits that he is a convicted criminal. If you understand what I mean by that, it does not make it any more likely that he committed this crime, but it may mean that it is more unlikely that the allegations made against the police officers are true than if they were made by a person of good character." In the Court of Criminal Appeal this was said to have been a proper direction on the limited effect of the appellant's bad character.

Clearly a direction of this nature is given more frequently than is sometimes supposed. In R v. Brown[2], where self-defence was pleaded, the judge said to the jury: "You will not allow your knowledge of his past to weigh your judgement of the evidence given in this case. It is relevant only in your consideration of the suggestion that it was Wright who was the aggressor on his occaasion." As Cross[3] pointed out, this being the only live issue in the case, it is difficult to

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1) (1959) 2 Q.B. 340 2) (1960) 44 Cr. App. R. 181 3) See Cross on Evidence, 5th ed. at p.434

describe the judge's admonition, though required by law, as anything other than specious. And he rightly went on to observe that: "The distinction sought to be drawn in R v. Cook[1] is only one degree less specious. How can the fact that it is more unlikely that allegations that a confession was improperly obtained were true than would be the case if they were made by a person of good character fail to render it more likely that the accused was guilty of that to which he confessed. When made before the jury the whole purpose of such allegations is to support the contention that the confession was untrue."[2]

In R v. May[3], it was decided that it was a matter of discretion, not duty, for the trial judge to warn the jury not to use his convictions to show the accused was a person with a propensity to commit crimes. In another and more recent Australian case - Donnini v. R[4], Barwick, C. J., quite elaborately discussed the matter as follows: "(T)he question of public importance which, in my opinion, is raised ... is the existence and extent of the duty of a trial judge to assist a jury as to the use they may make of evidence of prior convictions having no other relevance in the case than the character and credibility of the accused. It is the settled policy of the law that, in general, evidence of a prospensity to commit a crime or of a prospensity to commit a particular type of crime is not admitted for the consideration of a jury. But evidence of bad character, particularly where it serves no other purpose in a cause than

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1) (1959) 2 Q.B. 340 2) Cross On Evidence, 5th ed. at p. 434
3) (1959) V.R. 6 83 4) (1972) 128 C.L.R. 114 at p.123

the exposure of that character where the accused's credit is involved, is susceptible of use by a jury as indicating a propensity for criminal behaviour. Where the ground for granting the permission under Section 399 (e) (ii)[1] is an attempt by the accused to establish his own good character as a matter to be considered on the question of his guilt or innocence, the purpose of the section is to deny the accused the benefit of a false claim to good character. It does not intend to place bad character before the jury as a fact upon which they may conclude the guilt or innocence of the accused. It seems to me, however, that there is a high degree of possibility that a juryman will be prone to reason towards guilt by the use of the fact of prior conviction as indicative of a disposition to crime on the part of the accused. To so use the fact of prior conviction is to cut across a deeply entreched policy of the law. Therefore the not unnatural tendency of the juryman and the importance of that policy seem to me to require that the trial judge, when evidence of prior conviction is properly before the jury for the sole purpose of combating a suggestion of good character or to weaken or destroy an accused's credibility, must assist the jury by expressly and with emphasis telling them that they may not use the fact of prior conviction as tending to the guilt of the accused. In my opinion, in such a case, he should tell them quite clearly that the fact of prior conviction can only be used as a means of discrediting the accused in respect of any matter as to which he is in conflict in his evidence with witnesses for the Crown, or as to exculpatory facts or claims

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1) See S. 1(f) (ii) of the Criminal Evidence Act 1898; Ss. 141 (f) (ii) and 346 (f) (ii) of the 1975 (Scotland) Act; S. 159 (d) (ii) of the Nigerian Evidence Act

which he makes. Where the evidence of prior convictions or of bad character or tendencies is properly admitted for other purposes, it, may be that a clear statement of the use to be made of the evidence for those purposes may suffice."

It is however, very doubtful whether the distinction between cross-examination to credit and to the issue makes sense in this context, especially since it is unlikely that words can be found which will prevent the revelations elicited from the accused in cross-examination from being treated as something which enhances the probability of his guilt. We know that, as Barwick, C. J., pointed out above in Donnini's case, regardless of the direction that is given to the jury, it seems likely that they will take the accused's record into account when deciding whether or not he committed the crime. The most that can be hoped for is that the jury may be restrained from jumping to the conclusion that someone is guilty because "he is the kind of person who would do that kind of thing". Moreover, whatever remaining confidence as one might have in the distinction between cross-examination to credit and to the issue in the context is in no way increased by the court's tendency to pay particular attention to convictions for offences of the same category as that charged to the exclusions of others which, viewed in abstract, go more directly to credibility. A good example is the exclusion of the convictions for dishonesty and the inclusion of those for indecency in Selvey v. Director of Public Prosecutions[1].

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1) (1970) A.C. 304

It is essential to point out that the second limb of Section 1 (f) (ii) is liable to place counsel for the defence in a somewhat embarrasing position. Assuming that the prosecution has, as it should[1], informed him of his client's record, and of the known records of witnesses for the prosecution[2], he cannot cross-examine the witnesses without exposing the accused to retaliation in kind. On the other hand, failure to attack the witnesses' credibility may lead the jury to treat unreliable evidence as though it were trustworthy. This difficulty could be countered by a practice under which counsel for the Crown informs the Court of such matters as the previous convictions of his witnesses but there does not appear to be any general rule to that effect. In R v. Carey and Williams[3], Carey and Williams were convicted of shopbreaking and larceny. One of the main prosecution witnesses had previous convictions; this was known to counsel for Carey and Williams but he decided not to cross-examine the witness about them. Carey and Williams applied for leave to appeal on the gorund, inter alia, that the judge, or prosecuting counsel should have told the jury of the witness's bad character. It was held, refusing the application, that, a judge has no materials on which to question a prosecution witness as to character and in any event is not a matter for him. Nor has the prosecution any duty to disclose to the jury the character of the witnesses. There are some cases in which it is done but it is a matter of discretion. In the present case it was held that to have put before the jury the character of the witness in this way would have given them an unbalanced picture,

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1) Practice Direction, (1976) 2 All E.R. 928 2) Cf R v Collister and R v Warhurst (1955) 39 Cr. App. R. 100 and R v Mathews (1975) 60 Cr. App. R. 292 3) (1968) 52 Cr. App. Rep. 305

because they would have known his bad character but not that of Carey and Williams.

This case thus illustrates the unsatisfactory state of affairs arising from the provisions of the Criminal Evidence Act, 1898[1]. The accused with a bad character who wishes to give evidence dare not reveal the known bad character of the prosecutor or his witness because this will expose him to cross-examination as to his own misdeeds. Because the accused is keeping from the jury evidence which is certainly logically relevant as tending to show that he is an unreliable witness, other logically relevant evidence which is favourable to the accused is also withheld from them. This looks like rough justice: it is thought better to let the jury think that all the witnesses are of impeccable character, when they are not, than let them know that the prosecution witnesses are of bad character while concealing from them the truth about the accused. If the accused has witnesses other than himself who are of bad character, the rule is capable of working grave injustice; for them there is nothing to prevent the prosecution from revealing the bad character of the defence witnesses, other than the accused, while he will still be inhibited by his own bad character from cross-examining the prosecution as to credit. There are possible ways of surmounting the difficulties which have been mentioned. The first that readily comes to mind is the total repeal of the second half of paragraph (f) (ii)[2]; but the question is to what extent or rather on what terms

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1) S.1 (f); S. 399 (e) Crimes Act, 1958 - Victoria; Ss. 141 and 346 of the 1975 (Scotland) Act; S. 159 (d) Nigerian Evidence Act
2)Glanville Williams - The Proof of Guilt (3rd ed.) at 222

should the repeal be. For a start one may suggest that the subsection be amended in such a way as to make it plain that it has no application to cases in which the making of the imputations is necessary for the purpose of developing the accused's defence. Another course which would seem more desirable is to provide with full force general guidelines or criteria for the exercise of discretion in matters under the second part of Section 1 (f) (ii). This course is marred by the inevitable difficulties that accompany the dispensation of judicial discretion.

(8). THE INTERPRETATION OF SECTION 1 (f) (iii):-

It is now clear that when an accused gives evidence, he is liable to be cross-examined by any co-accused about any matter other than his character, even though his evidence has not been in any way adverse to that co-accused. In R v. Hilton[1], the appellant was jointly charged with ten others with the offence of aiding and abetting an affray. He pleaded not guilty. One of the defendants gave evidence in his own defence which did not incriminate any of the co-defendant. On application by the appellant and other co-defendants to cross-examine that defendant, the commissioner ruled that, in the absence of any evidence by the defendant tending to incriminate the appellant or any of the other co-defendants, they had no right of cross-examination. The appellant was convicted, on appeal it was held - allowing the appeal - that the ruling of the commissioner had been wrong, for the right to cross-examine a co-

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1) (1972) I Q.B. 421

defendant was well established and necessary in order that justice be done· that accordingly, the conviction would be quashed.

One of the cases referred to in the judgement in Hilton was Gemmell and McFadyen v. MacNiven[1], where the Court of Justiciary held that in Scotland the general right to cross-examine only arose when evidence had been given against the co-accused by the accused within the meaning of Section 1 (f) (iii). Gemmel's case bears to follow Hackston v. Millar[2], but that decision is not an authority for the word "only" in the rule. The rule is also qualified by Lee v. H M Advocate[3] which held that the co-accused has a duty to cross-examine the accused in the witness-box if he intends to give evidence incriminating that accused. In Scotland it is now thought that it would be more satisfactory to give the co-accused a right to cross-examine which is not so restricted; this brings it in line with the position in England[4] as indicated above. That was proposed in the Draft Code, by article 6 (3) (c), with hardly any adverse comment. Article 6 (3) (c) of the Draft Code is in the following terms: "An accused person may, with the consent of another accused call that other accused as a witness on his behalf, or he may cross-examine that other accused if that other accused gives evidence, but he cannot do both."

The Thomson Committee made the following observations on the rule[5]: "Rule (c) will involve an alteration to the existing law. As regards the first part of (c) we favour the suggestion that an accused may, with the consent of another accused, call that other accused as a

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1) (1928) S.C. (J) 5 2) (1906) 8 F (J) 52; 5 Adam 37; considered in Townsend v Strathern (1923) J.C. 66; and R N Gooderson, "The Evidence of Co-Prisoners", (1952) 11 CLJ 209, at 223 3) (1968) SLT 155 4) See R v Hilton (1972) 1 Q.B. 421 5) Thomson, para. 38:22

witness on his behalf. The second part of (c) would allow an accused person to cross-examine a co-accused whether or not the evidence of that co-accused incriminates him[1]. This change accords generally with the views of the majority of our witness. The present rules whereby co-accused A may only be cross-examined on behalf of another accused if his evidence incriminates them, is unduly restrictive in that the other co-accused are unable to obtain from A evidence in their favour. We therefore approve of the content of rule (c) and recommend accordingly. Indeed, we would go further and recommend that the evidence of every witness, whether an accused or not, should be evidence in causa and subject to general cross-examination." The law today by virtue of Section 141 (2) (b) of the Criminal Procedure (Scotland) Act, 1975, is that the accused may ask a co-accused any question in cross-examination if the co-accused gives evidence.

However, the accused can only be cross-examined about his character and, in particular, about any previous convictions when, in the words of Section 1 (f) (iii) of the Criminal Evidence Act 1898, as amended by the Criminal Evidence Act 1979 "he has given evidence against any other person charged in the same proceedings." The Act of 1898 originally referred to cases in which evidence was given against any other person "charged with the offence". The original version remains the provision in some Commonwealth countries like Australia[2] and Nigeria[3], in which case the relevant provisions of the statute in these countries permit cross-examination on the prohibited matters if

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1) Cf Young v H M Advocate (1932) J.C. 63 2) See S. 399 (e) Crimes Act, 1958, Victoria 3) S. 159 (d) (iii) of the Nigeria Evidence Act

"the accused has given evidence against any other person charged with the same offence." In other words, two conditions must be satisfied before the co-accused can cross-examine the accused about any previous convictions. First, the accused must have "given evidence against" the co-accused. Secondly, the co-accused must have been "charged in the same proceedings" or "charged with the same offence" - as the case may be - as the accused. Both conditions as we shall see, present considerable difficulties of interpretation. And there are still other problems. For instance, it has been observed that it is not clear whether this exception applies where the accused witness has given evidence against a person other than the person seeking to bring out his character: nor is it clear whether it applies where the evidence relied on by the cross-examiner has been given in other proceedings[1]. It is thought that both difficulties may be resolved if the rationale underlying the exception is that the accused witness "is in the same position as a witness for the prosecution so far as the co-accused is concerned, and nothing must be done to impair the right of a person charged to discredit the accusers"[2]. It has recently been said that the purpose of Section 1 (f) (iii) and its equivalents in other jurisdictions, was to allow an accused against whom a co-accused had given evidence, to cross-examine that co-accused "to show that credence ought not to be attached to the evidence which had been given against him".[3] The same reason was indeed given in the much earlier case of R v. Hadwen[4]. And in the reported cases cross-

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1) Renton and Brown, para 18:16 2) Cross on Evidence, 5th ed. at p. 435 3) Per Lord Morris in Murdoch v Taylor (1965) 2 W.L.R. 425, at 428 4) (1902) 1 K.B. 882

examination under Section 1 (f) (iii) has almost invariably been by counsel for the co-accused. The one exception is R v. Seigley[1], where it would appear that the prosecution conducted the cross-examination.

It is desirable for a thorough analysis of Section 1 (f) (iii) that one's discussion should be focussed on the construction and scope of the provision; one may then start by considering the significance and aptness of the expressions.

(I) CONSTRUCTION

" ... given evidence against ..." - It is a generally accepted view that it is not necessary that there should have been any hostile intent in order that a person should be held to have "given evidence against" his co-accused. The important point is, not the state of mind of the witness, but the likely effect of his testimony. One question which the House of Lords in Murdoch v. Taylor[2] had to decide was whether Murdoch had in fact "given evidence against" L within the meaning of Section 1 (f) (iii). In that case two accused L and M., were charged jointly with receiving stolen cameras. The prosecution alleged that L had tried to sell the cameras, which were in a box, to a shopkeeper for £100 but that being unsuccessful he had enlisted the help of M., who was waiting in a car outside, and that M had than suggested that the shopkeeper could have them for £60. The defence of L opened first and L in substance agreed with the prosecution's story. M in his defence, however, said inchief that until L invited him into the shop and said that the shopkeeper had

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1) (1911) 6 Cr. App. R. 106 2) (1965) A.C. 574

offered 160 he did not know that the box contained cameras and that he had become suspicious and had left. M was cross-examined by counsel for L and was asked whether he was saying that he had had nothing to do with the cameras but that it was entirely L's responsibility. M replied that he was. In view of M's answers counsel for L claimed the right to cross-examine M under Section 1 (f) (iii), and the court held that he could do so.

It is of course pertinent to mention the fact that prior to Murdoch v. Taylor[1], there were other cases[2] where the term "given evidence against" was discussed but no where was a definition attempted. The only case in which a court had previously attempted to define the term "against" was R v. Stannard[3]. In that case counsel for one accused had contended that though his client had given evidence which conflicted with the evidence of a co-accused he had not intended to attack him. Stannard together with C and B was convicted of conspiring to receive stolen property. Stannard in the course of developing his own defence, gave evidence which tended to incriminate C and B. The trial judge ruled that he had "given evidence against" C and B and that they were entitled to cross-examine him as to his previous convictions - Section 1 (f) (iii), Criminal Evidence Act 1898. Stannard appealed on the grounds, inter alia, that he had not "given evidence against" C and B. The Court of Appeal held, - dismissing the appeal - that the object of paragraph (iii) is to protect a defendant against whom a co-defendant has given evidence by enabling him to undermine the credibility of the co-

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1) (9165) A.C. 574 2) See R v Seighley (1911) Cr. App. R. 106 and R v Zangoullas (1962) Crim. L. R. 544 3) (1964) 2 WLR 461

defendant by cross-examining him as to his criminal record. This right to cross-examine it was held, when it arises is absolute[1], and so it follows that the test of whether evidence has been given against a co-defendant is objective, that is, has the evidence or any part of it been adverse in a material respect to the case of the co-defendant (has it undermined his defence or tended to support the prosecution case) and not subjective i.e., has the evidence been given with the object of saying something so adverse. Otherwise there would have to be a trial of the motives of the witness. It also follows that a defendant cannot claim immunity from cross-examination on the ground that he was only asserting what was necessary for his own defence. However, a mere conflict of fact will not necessarily amount to "giving evidence against"[2]. And it was further held that it would be rarely that an answer given by a defendant to a question from the judge would be sufficient to render him liable to cross-examination under Section 1 (f) (iii). Accordingly, it was decided in the present case that the cross-examination was properly allowed.

The House of Lords in Murdoch v. Taylor[3] in substance agreed with the text as suggested in R v. Stannard[4]. Lord Donovan observed as follows: "The text prescribed by the court of Criminal Appeal in Stannard was whether the evidence in question tended to support the prosecution's case in a material respect or to undermine the defence. I have no substantial quarrel with this definition."[5] Nevertheless,

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1) See R v Ellis (1961) I WLR 1064 2) R v Zangoullas (1962) Crim. L. R. 544 3) (1965) A.C. 574 4) (1964) 2 W.L.R. 461 5) (1965) A.C. 574 at 592

Lord Donovan considered that the expression "tended to" was better omitted. He said "I would, however, observe that some danger may lurk in the the use of the expression 'tended to'. There will probably be occasions when it could be said that evidence given by one accused 'tended to' support the prosecution's case simply because it differed from the evidence of his co-accused, and the addition of the words, 'in a material respect' might not wholly remove the danger. The difficulty is not really one of the conception but of expression. I myself would omit the words 'tended to' and simply say that 'evidence against' means evidence which supports the prosecution's case in a material respect or which undermines the defence of the co-accused"[1].

And Lord Morris of Both-y-Gest opined as follows: "The Act does not call for any investigation as to the motives or wishes which may have prompted the giving of evidence against another person charged with the same offence. It is the nature of the evidence that must be considered. Its character does not change according as to whether it is the product of pained reluctance or of malevolent eagerness. If, while ignoring anything trivial or casual, the positive evidence given by the witness would rationally have to be included in any survey or summary of the evidence in the case which, if accepted, would warrant the conviction of the 'other person charged with the same offence' then the witness would have given evidence against such other person. Such other person would then have the additional testimony against him. From this point of view that testimony would

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1) See Ibid

be just as damaging whether given with regret or whether given with relish"[1].

The only real note of dissent was struck by Lord Reid[2] who contrasted "evidence against" with "would tend to criminate" in Section 1 (e) of the 1898 Act. He expressed his doubt whether the word "against" would have been used if the intention had it been that Section 1 (f) (iii) should apply to all evidence which would tend to criminate the co-accused. He said: "If this provision has this wide meaning, an accused person with previous convictions, whose story contradicts in any material respect the story of a co-accused who has not yet been convicted, will find it almost impossible to defend himself."[3] Nevertheless, Lord Reid was unable to find any solution to the problem set by Section 1 (f) (iii) and did not therefore dissent.

In McCourtney v. H M Advocate[4], the court observed that the test favoured by the majority in Murdoch v. Taylor was "a stiff one" and expressed no opinion as to the correctness of its formulation. In that case, the appellant was tried on indictment with four others. Charge 1 was a charge that in his house and workshop, and a house occupied by his co-accused, the appellant and another produced a controlled drug, namely amphetamine sulphate, contrary to Section 4 (2) (a) of the Misuse of Drugs Act, 1971. He was convicted and sentenced to eight years' imprisonment. He applied for leave to appeal against conviction At the trial, a co-accused, R, gave

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1) Ibid at 584 2) Ibid at 583 3) (1965) A.C. 574 at 583
4) (1978) S.L.T. 10 at 13

evidence on his own behalf and at a later stage, the appellant gave evidence. In the course of the cross-examination of the appellant by counsel for R, the appellant was asked a number of questions intended to elicit, and which did elicit, that he had a number of previous convictions for dishonesty. The trial judge took the view after debate that the appellant had given evidence against his co-accused R within the meaning of Section 141 (f) (ii) and (iii) of the Criminal Procedure (Scotland) Act 1975. For the appellant it was argued (i) that before evidence given by one accused relating to another accused can be evidence against the other accused for the purposes of Section 141 (f) (iii), the evidence in question must support the the Crown case against the co-accused in a material way and undermine his defence; and (2) the trial judge misdirected himself in allowing the previous convictions of the appellant to be put to him in cross-examination by counsel for Robertson, for he did so upon the view that he had no discretion on the matter. The Court held that in the context of the evidence as a whole the appellant's evidence materially supported the Crown case and undermined the defence of R., and the trial judge accordingly made the correct decision. The conviction was consequently upheld.

It is pertinent to draw attention to the following passages in the judgement, the Court said: "For the appellant the first submission was that before evidence given by one accused relating to another accused can be evidence against the other accused for the purpose of

Section 141 (f) (iii) of the Criminal Procedure (Scotland) Act 1975, the evidence in question must support the Crown case against the co-accused in a material respect or undermine his. defence. This was the test favoured by Lord Donovan in Murdoch v. Taylor[1] and it is a stiff one. Applying that test in this case to the evidence given by the appellant in the passages which we have quoted the trial judge was wrong in holding that this evidence fell to be regarded as evidence against R. We have no hesitation in rejecting this submission."[2]

The meaning of the words "given evidence against" has been considered by the Court of Criminal Appeal in some recent cases. In R v. Davis[3], Davis was tried with O on a count for theft. They went to a house and bought some antiques. After thay had left the householder discovered that a soup tureen and a gold cross on a chain were missing. As to the tureen each said that they thought the other had bought it. As to the cross O said, in cross-examination, that after leaving the house Davis produced it from his pocket. Davis's counsel obtained leave to cross-examine O on his previous convictions Davis said that O's account was a pack of lies, and in cross-examination, "I am not suggesting he took the cross and chain. As I never, and it is missing, he must have done it but I am not saying he did. If it is not in the house, who did steal it I do not know. I am not going to imply that he stole it because I never saw him steal it. I have got no idea." O's counsel obtained leave to cross-examine Davis on his previous convictions Both were convicted of

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1) (1965) A.C. 574 at 592 2) (1978) S.L.T. 10 at 13 3) (1975) I W.L.R. 745

stealing the tureen and O alone of stealing the cross. Davis appealed on the ground inter alia, that the judge was wrong in ruling that he had given evidence against O. The Court of Criminal Appeal held that "evidence against" meant evidence which supported the prosecution case, or undermined the defence of the co-accused; that it was not necessary to show that the witness had a hostile intent against his co-accused. As only Davis or O or both of them could have stolen the cross, Davis's denial that he had done so necessarily meant that O had. The court attached no importance to Davis's use of phrases such as "a pack of lies" but his answers in cross-examination would have undermined O's defence. It had been submitted that mere denials did not come within Section 1 (f) (iii), relying on R v. Stannard[1]. Much would depend however upon the relevance of the conflict to the issues. In the present case the Court of Criminal Appeal observed that the conflict went to the root of the matter. If the jury accepted Davis's denial O had little chance of acquittal. Davis had to make it if he was to have a chance of acquittal although he thereby exposed himself to cross-examination and damaged his chances. The court however rightly observed further that some might not find the result attractive but no injustice had been done. In any event, the appeal was dismissed. I think it is fair to say that in this case, the interpretation of the majority judgement in Murdoch v, Taylor[2] was applied logically but with an odd result. It appears that where a crime must have been committed by one or other

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1) (1964) 2 WLR 461; see also R v Congressi (1974) 9 SASR 257 where a simple denial of the evidence of a co-accused was held not to attract the operation of an equivalent of the section. 2) (1965) A.C. 574

of two accused, A and B, either of them necessarily exposes his character to cross-examination merely be denying that he is the criminal. In this situation, moreover, the judge does not have his usual discretion to exclude the cross-examination.

In R v. Hatton[1], R, H and one other youth were caught red handed taking scrap metal from a building site. There was no dispute that all three were taking the metal and had no permission to do so. The only issue was whether their appropriation of the property was dishonest. It was the prosecution's case (which was supported by the evidence of R and H) that the three went together to the site. The first youth gave evidence that he was not in any way involved with the others before they got to the site. H. next gave evidence and said all three had been sent to the site to collect the scrap by the first youth's step-brother, which the first youth had denied in cross-examination. The first youth's counsel successfully applied for leave to cross-examine H as to his previous convictions. H appealed on the ground that although he had given evidence which damaged his co-accused's evidence by contradicting it, it was not evidence which made his acquittal less likely. It was held, dismissing H's appeal, that his evidence, if believed, not merely undermined the first youth's credit but on balance did more to undermine his defence than to undermine the prosecution's case. Adopting the language of Lord Morris of Borth-y-Gest in Murdoch v. Taylor[2], the positive evidence of H (and R) associating the first youth with them in their mission to the site "would rationally have

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1) (1976) 64 Cr. App. R. 88 2) (1965) A.C. 574 at 584

to be included in any survey or summary of the evidence in the case which, if accepted, would warrant the conviction of" the first youth. Accordingly the trial judge had been right to admit the cross-examination.

In R v. Bruce[1], the words "given evidence against" has produced some curious if strictly logical results. In that case, Bruce was tried with McGuiness and other youths on a charge of robbery. McGuinness, in his evidence, supported the prosecution case that there was a plan to rob. Bruce, on the other hand, denied that there was a plan to rob. McGuiness's counsel then cross-examined Bruce about his previous convictions on the basis that he had given evidence against McGuiness. In one sense Bruce's evidence was in favour of McGuiness since it contradicted the prosecution's case, but in another sense it was evidence against him since it also contradicted his evidence. The Court of Appeal held that on balance Bruce's evidence exculpated McGuiness of robbery and did not incriminate him. They thought it right to give the words of proviso (f) (iii) their ordinary meaning, if they could, without adding any gloss to them, but Murdoch v. Taylor[2] and other cases "at first sight show that a gloss had been put upon these words which this count is bound to put upon them." Stephenson L. J., giving the judgement of the court, said: "In our judgement, evidence cannot be said to be given against a person charged with the same offence as the witness who gives it if its effect, if believed, is to result not in his conviction but in

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1) (1975) I W.L.R. 1252 2) (1965) A.C. 574

his acquittal of that offence. The fact that Bruce's evidence undermined McGuiness's defence by supplying him another does not make it evidence given against him. If and only if such evidence undermines a co-accused's defence so as to make his acquittal less likely is it given against him. If that puts a gloss upon a gloss, the addition is needed to preserve the natural meaning of the sub-paragraph. Bruce's evidence did not so undermine McGuiness's defence. He should not have been asked questions about his previous convictions."[1]

Thus the necessity for adhering to the natural meaning of "against" appears to be emphasised by R v. Bruce where the construction laid down in Murdoch v. Taylor appeared to cause some difficulty. And it is thought with respect that the approach taken in R v. Bruce is the correct result and it is submitted that it should be made possible for the court to arrive at such a result without difficulty by making it clear that an accused does not give evidence against a co-accused where his evidence, if believed, would result in the acquittal of the co-accused.

Clearly problems of degree can arise when evidence given by one of two accused contradicts part of that given by a co-accused but is in other respects favourable to his case.

On a literal construction it is questionable whether evidence elicited in cross-examination has been "given" by the cross-examiner against "any other person charged with the same proceedings" or "with the same offence". If it has not, an accused who, as in R v. Miller[2], asks a Crown witness whether he was aware that the illegal

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1) (1975) I W.L.R. 1252 at 1259 2) (1952) 2 A11 E.R. 667

importations with which the court was concerned stopped while one of his co-accused was in prison, could not, for that reason alone, be cross-examined on his record by his co-accused. Section 1 (f) (iii) would of course be applicable if he referred to the matter of his evidence-in-chief or called a witness to testify to the same effect. It should be said that the case - R v. Miller - was not concerned with Section 1 (f).

"Any other person charged with the same offence"-

It is essential to discuss the importance and significance of these words even though it has been substituted in England and Scotland by the Criminal Evidence Act, 1979, because the words are still operative in other countries like Australia[1] and Nigeria[2]. Essentially as such, our discussion will largely rest on the salient English cases up to the time of the amendment. Effectively, the present discussion may be taken to be the discussion of the original Section 1 (f) (iii) of the Criminal Evidence Act, 1898.

Since the words "any other person charged with the same offence" have sometimes been described as being "plain and unequivocal"[3], it might be thought, therefore, that those words would have been interpreted by different courts in a consistent manner. But no such consistency is to be found. This lack of consistency is hardly surprising. The words "the same offence" are ambiguous as our discussion and a number of cases will reveal. I would like to follow Peter Mirfield's[4] submission "that four interpretations of

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1) S. 399 (e) Crimes Act, 1958 - Victoria 2) S. 159 (d) (iii) of the Nigerian Evidence Act 3) Per Lord Diplock in Commissioner of Police for the Metropolis v Hills (1978) 3 WLR 423 at 426A
4) See The Meaning of "the same offence" under S. 1 (f) (iii), (1978) Crim. L.R. 725

'the same offence' may be put forward. They are:- (1) The accused and the co-accused are charged with the same offence whenever they are charged in the same proceedings. Thus, if D1 is charged with stealing certain property and D2 with handling that property knowing or believing it to be stolen, they will probably be charged on different counts of the same indictment since there will be sufficient connection between their offences.[1] This interpretation will be referred to as the 'same proceedings' interpretation.

(2) The accused and the co-accused are charged with the same offence whenever they are charged in the same proceedings with offences carrying the same legal title. So, for example, if D1 and D2 are both charged in the same indictment with offences of theft they are charged with the same offences no matter what differences there are between the facts of the offences, and even though they are charged in different counts. Any theft is the same offence as any other theft. This interpretation will be "referred to as the 'same title' interpretation.

(3) The accused and the co-accused are charged with the same offence whenever they are charged in the same proceedings with offences carrying the same legal title and the offences in question exhibit sufficient similarity with regard to actus reus. So, for example, if D1 and D2 are both charged with offences of causing death by dangerous driving[2], it being alleged that their acts combined to cause the same death, that similarly in actus reus might be held to render their offences the same even though they could not be charged

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1) The principles governing the joinder of accused persons in the same indictment where no joint offence is alleged to be found in R v Assim (1966) 2 Q.B. 249 2) These facts are taken from Commissioner of Police for the Metropolis v Hills (1978) 3 WLR 423 - The offence of causing death by dangerous driving was abolished by S.50(i) of the Criminal Law Act 1977 as from December 1, 1977.

with a joint offence of causing death by dangerous driving. This interpretation will be referred to as the 'sufficient similarity' interpretation.

(4) The accused and the co-accused are charged with the same offence whenever they are charged with what amounts in law to a joint offence. For these purposes, it would not matter whether they were charged in the same indictment or in different counts of an indictment[1]. An example of such a joint offence would be the example of the joint burglary by D1 and D2 given above. This interpretation will be referred to as the 'joint offence' interpretation."

With four suggested interpretations having been set out, one may now consider how those interpretations were regarded by the courts prior to the Criminal Evidence Act 1979 (U. K.) which substituted "charged in the same proceedings " for "charged with the same offence".

At a fairly early stage, the courts rejected the "same proceedings" interpretation as the case of R v. Roberts[2] demonstrated. In that case, the appellant was charged with fraudulently converting property entrusted to him. His co-accused was charged with two offences of causing, by false pretences, money to be paid to the appellant. The appellant having given evidence against the co-accused the latter was allowed by the trial judge to cross-examine the appellant as to his previous convictions. It was held by the Court of Criminal Appeal that the cross-examination should not be allowed since it was

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1) In the case of a joint offence, the prosecution may charge both accused in the same count. However, they have no obligation to do so.
2) (1936) 1 All E.R. 23

impossible to say that the appellant and the co-accused had been "charged with the same offence".

A similar view was taken in R v. Lovett[1]. In the case, the accused - Lovett - was charged with entering a house as a trespasser and stealing therein a television set. His co-accused, Gregory, was charged with handling that television set. The Court of Criminal Appeal held that Gregory should not have been allowed to cross-examine Lovett as to his previous convictions because, in the words of Edmund Davis L. J., delivering the judgement of the court: " ... in the present case the offence of theft and handling charged against the defendant and Gregory respectively were not the 'same offence' even though the same 'Sobell' television set was the subject matter of both charges."[2] Thus, there is a clear and convincing authority against the "same proceedings" interpretation.

And the case of R v. Russell[3] could be said to be an example of the rejection of the "joint offence interpretation". There, R was convicted of possessing (Count 4; and also uttering - Count 2) forged bank notes. H was convicted of possessing the same notes (Count 3). The prosecution case, based on admissions alleged to have been made by R and H to the police, was that R first had possession of the notes and he uttered them to H. Both attacked the prosecution witness (R more violently than H) and each denied possession, saying that the other had offered him the notes and he had refused to take them. The prosecution obtained leave to cross-examine R as to his character but made no application in respect of

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1) (1973) 1 W.L.R. 241; (1973) 1 All E.R. 744 2) (1973) I W.L.R. 241 at 243 3) (1971) I Q.B. 151

H. Accordingly R sought to cross-examine H under proviso (ii) and (iii) of Section 1 (f) of Criminal Evidence Act 1898. The judge ruled proviso (ii) only applied to cross-examination by the prosecution and as to proviso (iii) that R and H were not charged with the same offence since their possession of the notes was not co-incident or joint but consecutive. The Court held that dealing with proviso (iii), there was no direct authority on the point. Reference to Webster's Dictionary showed that "same" was not used to describe two things which were identical but merely two things which possessed the same relevant characteristics. Looking at the circumstances of the case, and accepting that R and H would have been charged with the same offence if it had been alleged that they had been jointly in possession of the notes, the court found it impossible to say that the offences charged against them ceased to be the same because the possession alleged was successive rather than coincident. The possession was successive in an immediate sense: one surrendered possession at the instant when the other received it; the subject matter, the nature of the offence and the circumstances to be proved were the same and the offences took place, if not technically at the same instant, at moments which were immediately successive. It would be unsatisfactory and unjust if R were denied the right to cross-examine H merely because their possessions were not at the same time but were successive. It was held that the judge's ruling was wrong, and since it was not a case for the application of the

proviso to the Criminal Appeal Act 1968, the convictions would be quashed.

Until R v. Lauchlan[1] was decided, there was no authority against the "same title" interpretation. However in R v. Russell[2], if the Court of Criminal Appeal had accepted that interpretation as the correct one, it would have given the court a very simple ground for allowing the appeal. It is clear that the court did not accept that interpretation. The judgement of the Court was delivered by Widgery L. J., assuming that some further similarity was required. H and R had been charged with the "same offence" because: "The subject-matter was the same, the nature of the charge was the same, the circumstances to be proved were the same, and the offences took place, if not technically at the same instant, at moments which were immediately successive one with the other"[3]. The clear assumption of the Court of Appeal here was that the "sufficient similarity" interpretation rather than the "same title" interpretation was the correct one. And this rejection of the "same title" interpretation is confirmed by R v. Lauchlan.

In Lauchlan's case, the appellant was charged, on one count of an indictment, with assaulting a man called E, occassioning him actual bodily harm. On another count of the same indictment, E was charged with assaulting the appellant causing him actual bodily harm. The two counts, both charging offences contrary to Section 47 of the Offences Against The Person Act 1861, arose out of an alleged fight between the appellant and E. Giving his evidence-in-chief, E stated

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1) (1978) R.T.R. 326 (note) 2) (1971) I Q.B. 151 3) Ibid at 155

that the appellant had been the aggressor. Counsel for the appellant sought leave to cross-examine E as to his previous convictions for violence. The trial judge ruled against the appellant because he did not regard the two accused as being "charged with the same offence". This ruling was upheld by the Court of Appeal. The court referred to the facts needing to be proved by the prosecution in respect of each offence. Delivering the judgement of the court, Shaw L. J., said: " ... the subject matter is not the same in two counts in the indictment. One of the counts alleged that the appellant assaulted Mr E, the other that Mr E assaulted the appellant. The circumstances as to be proved were not the same ..., but different. To procure a conviction of Mr E or on the other hand to justify a conviction of the appellant, required proof of differing facts."[1]

Thus, R v. Lauchlan[2] provides support for the view that identity of legal title of the offences will not suffice for the purpose of Section 1 (f) (iii). More positively, it seems to require some degree of similarity between the offences with regard to actus reus. It appears that after Lauchlan, there was only one interpretation of "the same offence" which was consistent with all the authorities, namely the "sufficient similarity" interpretation. Unfortunately however, while clearly supporting the "sufficient similarity" interpretation the case provides us with no test as to what kind or degree of similarity is required.

And as Peter Mirfield observed[3]: "The decision on the facts of

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1) (1978) R.T.R. 326 at 327 2) (1978) R.T.R. 326 3) The Meaning of "the same offence" under S.1 (f) (iii), (1978) Crim. L.R. 725 at 729

Lauchlan is rather surprising in policy terms. Where the two accused are charged with offences against or affecting some third party they may well have an interest in presenting a united front against the prosecution. They may both tell a similar story, their defences standing or falling together. If so, the one is unlikely to give 'evidence against' the other. Where, however, as in Lauchlan, the two accussed are alleged to have assaulted each other, there is unlikely to be any interest in presenting a united front against the prosecution. Typically, each will say he was defending himself against the attack of the other. Inevitably, in that situation, each will give 'evidence against' the other. Thus, Lauchlan decides that Section 1 (f) (iii) is unavailable to the accused in the very situation where he is likely to need it most often. One needs only to consider the possibility that the accused has no previous convictions for violence while the co-accused has a large number of such convictions in order to see the degree of hardship which may be inflicted upon the accused."

On the other hand, one difficulty with the "same title" interpretation needs to be mentioned. The core of the issue here is in answering the question:- With what degree of particularity does one define an offence? For example, is burglary contrary to Section 9 (1) (a) of the Theft Act 1968 the same offence, as a matter of legal title, as burglary contrary to Section 9 (1) (b) of the same Act? One may say that in each case the offence is burglary. It may equally be said to be entering a building as a trespasser with inte-

rest to steal in the one case and, having entered a building as a trespasser, stealing therein in the other. It should be noted that, in an indictment, the "Statement of Offence" will refer to "Burglary contrary to Section 9 (1) (a) of the Theft Act 1968" or to "Burglary contrary to Section 9 (1) (b) of the Theft Act 1968"[1] It will not refer to "Burglary contrary to Section 9 (1) of the Theft Act 1968." This difficulty, arising from the "same title" interpretation will probably be obviated if the "sufficient similarity" interpretation be accepted. Although it is not a necessary condition of the latter interpretation that the offences carry the same legal title, some sufficient similarity with regard to actus reus is required. In that respect, there would seem to be an obvious and relevant difference between any Section 9 (1) (a) offence and any Section 9 (1) (b) offence. In the former the act of entering as a trespasser with the requisite intent is all that is required. In the latter, two acts are required, the act of entering as a trespasser and the act of theft or of infliction of grievious bodily harm or whatever. Thus, no Section 9 (1) (a) offence would be "sufficiently similar" to any Section 9 (1) (b) Offence.

In R v. Rockman[2], Rockman refused D entry to his shop. D upset, swung a punch at Rockman, who hit him in the face, causing him to fall to the ground. Police officers came on the scene but there was a dispute as to whether what they saw was D lying on the pavement being kicked by Rockman or Rockman struggling to free his foot which

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1) See e.g. Archibald, Criminal Pleadings Evidence and Practice (39th ed, 1976) at para. 1489 2) The Times, November 30, 1977; (1978) Cr. L.R. 162; Court of Appeal transcript reference number 287/A2/77.

was being held by D. When Rockman eventually stood back D got up and stabbed him in the chest with a knife. D was charged with maliciously wounding Rockman contrary to Section 20 of the Offences against a Person Act 1861 and Rockman with assualting D thereby occasioning him actual bodily harm, contrary to Section 47 of the same Act. The Crown accepted that R's original blow was struck in self-defence and relied on the disputed evidence of the police officers. Counsel for Rockman unsuccessfully sought to cross-examine D under Section 1 (f) (iii) of the Criminal Evidence Act 1898 as to his previous convictions. Rockman appealed against conviction on the ground inter alia, that the cross-examination had been wrongly excluded.

The simple answer to this ground of Rockman's appeal was that the offences charged against D and Rockman were legally distinct. And indeed Ormrod L. J.,[1] delivering the judgement of the court, referred to this point with apparent approval: "Prima facie, one would think that there could be no question of that exception applying in this case because the two offences in question were, as I have already indicated, respectively an offence of malicious wounding by Davies on Rockman on the one hand and an offence of actual bodily harm caused to Davies by Rockman on the other. It would be, perhaps, rather difficult to think of the two offences more clearly separate although, of course, they arise out of the same incident."

Nonetheless, the Court of Appeal chose to reject this ground of Rockman's appeal on an entirely different basis. Ormrod L. J.,

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1) Transcript 287/A2/77 at p.3; (1978) 67 Cr. App. Rep: 171 at 172

referred to an arguement of counsel for the Crown. That argument and the Court's reaction to it merit quotation in full: "Mr Binning, who appears in this Court for the Crown, has answered (counsel for Rockman's submission) quite shortly by saying that the essential feature of this proviso is that the two defendants should, in some way or other, be accused of pursuing the same enterprise, although perhaps with differently specified offences, the purpose of the proviso being, he submits, to discourage them, from each blaming the other with impunity so far as their past records were concerned. Mr Binning submits that the proviso cannot apply where the essence of the case is that each defendant is charged with committing an offence against the other. Prima facie, there seems to be strong grounds for thinking that Mr Binning's submission is right. This Court has come to the conclusion that it is right, and that the learned Recorder was correct in his ruling that the proviso did not apply in this case where each of these two men was charged with doing something to the other."[1]

The interesting feature of this passage is that it may provide a test for determining whether the offence of an accused and that of his co-accused are sufficiently similar with regard to actus reus. It has been pointed out that Lauchlan[2] provides us with no such test; the same can be said of Russell[3]. In each of those cases, the judge refered to particular similarities or differences between the offences without attempting to extract some general principle. The notion

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1) Transcript 287/A2/77 at p.4 2) (1978) R.T.R. 326 (note)
3) (1971) 1 Q.B. 151

that accused and co-accused must have been "pursuing the same enterprise although perhaps with differently specified offences" is a general one. However, it is not clear how much of Mr Binning's submission the Court of Appeal concluded to be correct. Was it agreeing with the "same enterprise" submission or only with the more limited submission that these offences could not be the same because each of the men was charged with doing something to the other? That more limited submission would deal only with the situation where the parties are alleged to have been fighting. It would be of no use in any other situation.

In Commissioner of Police for the Metropolis v. Hills[1], Hills was driving his employer's car along Western Avenue in North London when another car, driven by L turned right through an intersection in front of him. Hill's vehicle collided with L's and bounced off it on to the kerb, killing a woman standing there. Hills and L were charged in successive counts of the same indictment with causing the death of the woman by dangerous driving, contrary to Section 1 of the Road Traffic Act 1972. The offences charged against Hills and L were particularised in exactly the same way. Hills having given evidence against L, application was made on behalf of L to cross-examine Hills as to his previous convictions. The judge having ruled in favour of the application, H sought leave from the Court of Appeal to appeal against his conviction. L had been acquitted. The Court of Appeal granted Hills leave to appeal but then dismissed his appeal. Orr, L. J., delivering the judgement of the Court, distinguished Lauchlan[2]

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1) (1978) 3 WLR 423 2) (1978) R.T.R. 326 (note)

and Rockman[1] and followed Russell[2], holding that L and H had been charged with "the same offence". The court accepted that the words "the same offence" were not confined to cases involving a joint offence, Russell being the authority on this point. The decisive positive factor, as far as the court was concerned, was that, though there were obvious differences in actus reus between the offences of H and L there was a vital factor uniting the two offences, namely that the same death had been caused.

H was granted leave to appeal to the House of Lords: their Lordships unanimously decided to allow the appeal[3]. In doing so, they unanimously agreed to overrule Russell. It will be convenient to consider first Lord Russell's reasons for allowing the appeal. It is submitted that the essence of his reasoning is to be found in the following passage[4] : "Suppose there had been no question of death resulting from the collision, and each had been charged on the same indictment with the relevant dangerous driving. I do not consider that they could have been charged together in one count: the offence of dangerous driving alleged against one was factually quite different from the offence of dangerous driving alleged against the other: they were not 'the same offence' in that they were not identical. The fact that in the instant case a death resulted, and that casuing it is included in the charges, cannot alter that; because the first essential step is for the prosecution to prove the dangerous driving, and only when those dangerous drivings were proved, to show that

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1) (1978) Crim. L.R. 162; Court of Appeal Transcript reference number 287/A2/77 2) (1971) Q.B. 151 3) (1978) R.T.R. 320 at 324 L.
4) (1978) 3 W.L.R. 423 at 430 B-C

death was thereby caused."

It seems clear that the key words are: "I do not consider that they could have been charged together in one count". Accused and co-accused may be charged together in one count only if they are alleged to have committed a joint offence; otherwise the count will be bad for duplicity since it will charge more than one offence. Where they are charged in different counts they are "charged with the same offence" only if they could have been charged in the same count. Thus, Lord Russell is saying that, in order for Section 1 (f) (iii) to be potentially applicable, accused and co-accused must be alleged to have committed a joint offence. The words "they were not 'the same offence' in that they were not identical" would seem to refer to the absence of identity as between actus reus of the offence alleged against H and the actual reus of that alleged against L. Only where a joint offence has been committed with the actus reus of the accused and that of his co-accused be identical. In other circumstances, the differences may sometimes be merely trivial, yet they will still be differences. Lord Russell described Russel as "an erroneous decision" caused by the Court of Appeal's anxiety "to escape from too strait a jacket"[1]

Viscount Dilhorne's judgement at the outset dealt with the position where accused and co-accused are charged together in one count of an indictment. He said[2]: "If two or more persons are jointly charged in a count, that count will be bad for duplicity if it charges more than one offence. When it is not bad for duplicity, each accused is

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1) (1978) 3 W.L.R. 423 at 430 E. 2) Ibid p.427 E.

one offence. When it is not bad for duplicity, each accused is charged with the same offence and if one accused has given evidence against another accused in that count, it cannot be doubted that proviso (iii) to Section 1 (f) applies." This passage provides no support for the "joint offence" interpretation as against the "sufficient similarity" interpretation.

The passage immediately following this it is submitted, indicates that Viscount Dilhorne favoured the "joint offence" interpretation. He stated: "Where it is alleged by the prosecution that two or more persons have committed the same offence, it would indeed be unusual to find them indicted together but only charged in seperate counts. If, though indicted together, they are charged only in separate counts, that may be taken as an indication that the prosecution at least did not regard them as charged with the same offence."[1]

That inference may be drawn from one further passage where Viscount Dilhorne said: "As I have said where persons are jointly charged with one offence and the charge is not bad for duplicity, they are charged with the same offence within the meaning of the Act. If charged separately with offence, a test of whether they are charged with the same offences is whether they could have been charged jointly." [2]

The test of whether persons are "charged with the same offence" proposed here is, in effect, whether they are charged with what amounts in law to a joint offence. For, as has been pointed out, only where their offence is a joint one can they lawfully be charged

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1) (1978) 3 W.L.R. 423 at p. 427F 2) Ibid at 428H - 429A

in the same count. Yet, even this inference is a doubtful one. Viscount Dilhorne does not say that the test is "whether they could have been charged jointly" but only that this is a test. It cannot be said that he unequivocally rejected the possibility of any other test being applied as an alternative in the case of persons charged in separate counts. And his treatment of R v. Russell[1] led him to put forward another test. In a passage he said: "In my view for the offences charged to be regarded as the same for the purpose of the proviso, they must be the same in all material respects including the time at which the offence is alleged to have been committed, and a distinct and separate offence similar in all material respect to an offence committed later, no matter how short the interval between the two, cannot properly be regarded as 'the same offence'."2

This would in effect be taken to mean that the two accused in R v. Russell were not "charged with the same offence" because there was a minute time interval between their respective possessions of the forged banknotes, this interval preventing their offences being "the same in all respects". If the only test of whether two persons charged in separate courts are "charged with the same offence" is "whether they could have been charged jointly" the decision in R v. Russell is wrong simply because the accused in that case could not have been so charged. Reference to the offences of the two accused not being "the same in all material respects" would then be superfluous. It may, therefore, be argued that Viscount Dilhorne was in favour of overruling Russell not because the Court of Appeal in

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1) (1971) 1 Q.B. 151 2) (1978) 3 W.L.R. 423 at 428 G-H

that case failed to apply the "joint offence" interpretation but because that court applied an incorrect version of the "sufficient similarity" interpretation, the correct version being that the offences must be "the same in all respects".

On the other hand, it might be argued that, in requiring that the offences be "the same in all material respects" Viscount Dilhorne was simply expressing the "joint offence" interpretation in a different way. Offences will only be the same in all material respects where they are joint ones. But, while it is difficult to think of cases where there would be no joint offence yet where the offences might be said to be "the same in all material respects", it is not impossible. For example, if D1 drove his car along a road at high speed and without keeping a proper look-out and D2 did the same things along the same road in the opposite direction, resulting in a head-on collision between the two, both D1 and D2 might be charged in separate counts of the same indictment with the offence of reckless driving.[1] There would be no joint offence in these circumstances since they would not have aided each other in doing physical acts[2] or have acted in concert[3]. Yet, the example will not be on all fours with Hills' case since there, as Viscount Dilhorne pointed out[4], the ways in which H and L drove dangerously were different. L had turned into the path of an on-coming car when it was unsafe to do so while H had driven too fast and not kept a proper look-out. Here, on the other hand, not only would the road be the same, the time be the same

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1) See S.2 of the Road Traffic Act 1972 as amended by S. 50 (1) of the Criminal Law Act 1977. 2) As suggested by Lord Diplock in D.P.P. v Merriman (1973) A.C. 584 at 606. 3) See D.P.P. v Merriman (1973) A.C. 584 and R v Rowlands (1972) 1 QB. 424 4) (1978) 3 WLR. 423, at pp. 427H. - 428A.

and the result be the same with regard to each offence, but the way in which D1 and D2 drove recklessly would also be the same. Since the facts that the cars were different and that they were travelling in different directions could hardly be regarded as material, it can convincingly be argued that the offences of D1 and D2 were "the same in all material respects."

"... any other person charged in the same proceedings"- As already mentioned earlier, the Criminal Evidence Act 1898 originally referred to cases in which evidence was given against any other person "charged with the same offence". Without doubt these words were unduly restrictive because there are many joint trials in which the accused cannot by any strength of imagination be said to be charged with the same offence. An obvious ambiguity surrounds the words "the same offence". The offences of any accused and co-accused can never be identical, even though a joint offence be alleged against them. So, for example, if D1 and D2 break into a house together and one of them ransacks the rooms upstairs, the other the rooms downstairs, they will probably be charged with a joint offence of burglary, involving the theft of all the property taken by the two of them. In this situation, there are two obvious differences between the offence of D1 and that of D2. First, the mens rea of each of them is entirely separate and the mens rea of one of them may differ from the mens rea of the other. Secondly, the physical acts of D1 and D2 are different, one having taken property from upstairs, the other from

downstairs. It is only a matter of law that the physical acts of D1 are, in effect, deemed also to be those of D2 and vice versa. The position was succinctly stated by Lord Diplock in D. P. P. v. Merriman[1], as follows: "But when two men are aiding one another in doing physical acts with criminal intent, though the mens rea of the separate offence of each is personal to the individual charged, the physical act of either one of them is in law an actus reus of the separate offence of each. A 'joint offence' of two defendants means no more than that there is this connection between the separate offences of each, so that as against each defendant not only his own physical acts but also those of the other defendant may be relied upon by the prosecution as an actus reus of the offence with which he is charged."

In the discussed case of Commissioner of Police for the Metropolis v Hills[2], the House of Lords criticised the phraseology - "charged with the same offence". Viscount Dilhorne expressed the hope that the Criminal Law Revision Committee would be asked to give attention to the reform of Section 1 (f) (iii) without delay[3]. He agreed with the following words of Edmund Davies in R v. Lovett[4]: "It has been suggested (and not without good reason) that the law on this matter is unsatisfactory, and that the mischief aimed at in proviso (iii) would be more satisfactorily dealt with if it appiled whenever two accused are jointly tried, even though they are not charged with the same offence ..." The Criminal Law Revision Committee, in its Eleventh Report[5], came to a similar conclusion by recommending that in

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1) (1973) A.C. 584 at 606 2) (1978) 3 WLR 423 3) Ibid at 429E 4) (1973) 1 W.L.R. 241 at 243 5) "Evidence (General)" June 1972

Section 1 (f) of the 1898 Act the words "jointly charged with the same offence" should be altered to "jointly charged with him in the same proceedings."[1] And consequently in the U.K. the Criminal Evidence Act 1979 substituted the words "charged in the same proceedings" for "charged with the same offence". It is hoped that an amendment on similar lines would be made in other countries with similar provisions - Australia and Nigeria amongst others. It is thought that the new wordings restores the intention of the Act and is wide enough to cover any case where the defendants are being tried before the same court on the same occassion, and not only where they are jointly charged, in the sense that a joint enterprise in respect of one offence is alleged against them, and there is no obvious reason why it should cause difficulty.

(ii) SCOPE

Discretion - (a) Cross-examination by Co-accused:-

A further question for the House of Lords in Murdoch v. Taylor[2] was whether, if an accused has given evidence against a co-accused, the judge has a discretion to exclude cross-examination under Section 1 (f) (iii). Under Section 1 (f) (i) and (ii) it has been held that the judge does have a discretion where the result of such cross-examination would be to "make a fair trial of the accused almost impossible[3]," and there is nothing in the wording of Section 1 (f) (iii) to suggest that there the position is different. Nevertheless,

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1) CLCR, para. 132 2) (1965) A.C. 574; (1965) 2 W.L.R. 425

3) Per Singleton J, R v Jenkins (1945) 114 L.J.K.B. 425; see also R v Cook (1959) 2 K.B. 340; R v Flynn (1963) I Q.B. 729

whereas the exercise of the discretion to exclude under Section 1 (f) (i) and (ii) will normally be at the expense of the prosecution, under Section 1 (f) (iii) it will normally be at the expense of the co-accused.

It has been held that the court has no discretion to refuse leave to a co-accused to cross-examine under Section 1 (f) (iii) if it considers that the subsection applies to the case, although it would have a discretion to refuse such leave if the application under the subsection were made by the prosecution. That is so upon the view that A, by giving evidence against B, becomes, from B's point of view like a witness for the prosecution, and is therefore open to cross-examination on his misconduct in order to show that he should not be believed.

As Lord Donovan said in Murdoch v. Taylor[1] "when it is the co-accused who seeks to exercise the right conferred by proviso (f) (iii) different considerations come into play. He seeks to defend himself, to say to the jury that the man who is giving evidence against him is unworthy of belief; and to support that assertion by proof of bad character. The right to do this cannot, in my opinion, be fettered in any way." The earliest reported case where the Court of Criminal Appeal held that they had no discretion to prevent a co-accused cross-examining under Section 1 (f) (iii) was R v. Rothery[2], but this has since been followed by a series of cases[3] and now by Murdoch v. Taylor. It will be pertinent to discuss some of these cases. In R v. Ellis[4], E was convicted of breaking and entering and

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1) (1965) A.C. 574 at 593 2) (1958) Crim. L.R. 618
3) See R v Stannard (1964) 2 W.L.R. 461; R v Riebold (1964) Crim. L.R. 530 4) (1961) I W.L.R. 1064

stealing, and receiving. One G was also tried on the same indictment. The evidence for the prosecution included evidence that E and G were seen together removing articles from a warehouse and loading them on a van. E giving on his own behalf said that G had told him that he had bought some bankcrupt stock and had asked him (E) to help move it. G's counsel then applied for permission to cross-examine E on his criminal record on the basis that E had given evidence against a co-accused charged with the same offence, in accordance with the provisions of Section 1 (f) (iii) of the 1898 Act. The trial judge ruled that such cross-examination was permissible. Later G changed his plea to one of guilty on the receiving charge but as the prosecution were unwilling to drop the other charge, the trial proceeded. When G gave evidence, he admitted that he might have told E that he acquired some bankcrupt stock. On appeal to the Court of Criminal Appeal it was held, dismissing the appeal, that at the time when E was cross-examined as to character, G's defence was that he was not present for more than a moment and that he had been asked to hire the van for E. In those circumstances the evidence given by E was properly held by the judge to be evidence against a person charged with the same offence within the meaning of Section 1 (f) (iii) of the 1898 Act. Where the fact brought the matter within the relevant statutory exception, cross-examination as to character was a matter of right not of discretion.

Similarly, in R v. McGuirk[1], M was convicted of conspiracy to

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1) (1963) 48 Cr. App. R. 75

defraud. There were conflictes between his evidence and that of G who was convicted with him. In particular, M said that he had signed a certain false document given to him by G because G persuaded him to do so, and without appreciating its significance. G said that he had neither given the document to M nor had he invited M to sign it. The trial judge refused an application on behalf of M to cross-examine G as to previous convictions, under Section 1 (f) (iii) of the Criminal Evidence Act 1898. The Court held as follows: G "Had given evidence against" M[1]: the judge had no discretion to disallow the cross-examination[2]: G's previous convictions were so material to M's defence that he was the dupe of a fraudulent person that the proviso to Section 4 of the Criminal Appeal Act, 1907, could not be applied and the conviction would be quashed.

It is important to point out that in Murdoch v. Taylor[3], Lord Morris, while agreeing that the court had no discretion to exclude cross-examination by a co-accused did, however, stress the need for the judge to have regard to the relevance of the proposed questions - Lord Morris quoted with approval the words of Lord Sankey in Maxwell v. D. P. P.[4]. This indeed would seem correct and the judge ought normally to exclude cross-examination as to, for example, a previous acquittal.[5] Nevertheless, a power to exclude on the ground of relevancy can sometimes appear to be indistinguishable from a general discretion to exclude, and if Lord Morris was trying to give the judge a discretion, though through the back door rather than the front, he would appear to be in disagreement with the majority of

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1) R v Stannard (1964) 2 WLR 461; 2) R v Ellis (1961) I WLR 1064
3) (1965) 2 WLR 425; (1965) A.C. 574 4) (1935) A.C. 309 at 319
5) In Maxwell v D.P.P. itself, cross-examination as to previous acquittal was disallowed under S.1 (f) (ii) on the ground that it was not relevant. See also Stirland v D.P.P. (1944) A.C. 315

the court[1].

Lord Pearce, however, did dissent on the question of discretion. He quoted with approval the Tasmanian case of Hill v. The Queen[2] which held that there was a discretion under a similarly worded Tasmanian statute. Though Lord Pearce considered that the exercise of the discretion should be within fairly narrow limits he did give two examples where the discretion should be exercised. First where counsel for one accused has deliberately led another accused into a trap by putting to him questions which compel him to contradict the story of his co-accused; secondly "where the clash between the two stories is both inevitable and trivial."

I must say that the proposition made by Lord Pearce looks appealing at first glance, but as a matter of fact it is arguable that the issues raised by him have been appropriately answered by Lord Morris. On the fist point, Lord Morris observation that "a judge would be alert to protect a witness from being cajoled into saying more than it was ever his plan or wish to say" is pertinent and clearly judges ought now to be so alert. On the second point, Lord Morris pointed out as shown above that under the rule in Maxwell v. D. P. P.[3] evidence must have relevance as well as falling within the terms of the statute and that it is for the judge to rule whether the evidence is sufficiently relevant.

In McCourtney v. H. M. Advocate[4], it was held by the High Court of Justiciary that once an accused has given evidence against a co-

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1) It is perhaps of note that Lord Sankey in Maxwell was speaking of a discretionary power. 2) (1953) Tas. S.R. 54 3) (1935) A.C. 309 at 319 4) (1978) SLT 10 at 13

accused there is no discretion in the trial judge to refuse the accused the right to cross-examine him as to his criminal record. The Court observed that it could never be conducive to a fair trial to deny to an accused person, against whom a co-accused has given evidence, the right to cross-examine him as to credit and character.

It is a fair comment to say that arguments in favour of giving a discretion to the trial judge do not appear to be strong. As Sherrif McPhail pointed out "It may be argued that there might be a case for giving a discretion to the court in order to enable it to do some justice, as far as possible, in a case where A has only one relevant conviction and B has many, and B proposes to question A about his single conviction and to call witnesses to say that A committed the offence, but not to give evidence himself. In Scotland, however, the trial judge could not have the material on which to exercise a discretion in that situation, because he remains ignorant of the criminal records of A and B unless and until they are convicted, and he is also unaware of the nature of the evidence to be called on behalf of B."[1] "It may be further argued that cases can arise in which the connection between the charge against one accused and those against his co-accused are tenuous, and that in such a case, where two accused are not charged with the same offence or, at least are not charged with offences which are so inter-connected as to stand or fall together, gross injustice might result if one accused, as a matter of right, was allowed to cross-examine another as to his antecedents and character[2]. But cases where the charges are des-

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1) Sherrif McPhail Research Paper § 5:67 2) Cf I. R. Scott, "Cross-examination by Co-defendant" (1973) 36 MLR 663

cribed where it would be in the interests of the accused to give evidence against another, and where it could be unfair to permit the other to elicit his record or bad character, may be thought to be rare."[1]

The Criminal Law Revision Committee in England reached the view by a majority that it is unacceptable that it should be possible to prevent an accused person from bringing out the misconduct of another accused who has given evidence against him. In particular, they thought it unsound to make the matter one of discretion because that might lead to too much difference in the way in which the discretion was exercised.[2]

Discretion - (b)Cross-examination by Prosecutor:-

It should be made clear that the prosecutor may cross-examine under proviso (f) (iii), subject to the discretion of the Court. That appears to be the law in England. As Lord Donovan said in Murdoch v. Taylor[3], if the prosecution sought to cross-examine under Section 1 (f) (iii) the Court would have a discretion. He observed as follows: "if, in any given case (which I think would be rare) the prosecution sought to avail itself itself of the provisions of proviso (f) (iii) then here, again, the court should keep control of the matter in the like way. Otherwise, if two accused gave evidence one against the other, but neither wished to cross-examine as to character, the prosecution could step in as of right and reveal the criminal records of both, if both possessed them. I cannot think that

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1) Sheriff McPhail Research Papers at § 5:67 2) C.L.C.R. § 132
3) (1965) A.C. 574 at 593

Parliament in the Act of 1898 ever intended such as unfair procedure. So far as concerns the prosecution, therefore, the matter should be one for the exercise of the judges discretion, as it is in the case of proviso (f) (ii).

Also in R v Lovett[1], Lovett was charged with stealing a television set and G., his co-accused was charged with handling it. Lovett cast serious imputations on a witness for the prosecution and gave evidence against G. G's counsel immediately cross-examined him on his previous convictions; he was convicted and G acquitted. On Lovett's appeal the Court of Appeal held that cross-examination under Section 1 (f) (iii) as to it then was worded was improper because two accused were not charged with the same offence but, as counsel for the prosecution had intended to seek to cross-examine under Section 1 (f) (ii), the Court of Appeal exercised the discretion which the judge would have had and dismissed the appeal.

The Court, on the authority of R v. Seighley[2], expressed the view thatthe prosecution may, subject to the discretion of the judge to prohibit such a course, cross-examine under Section 1 (f) (iii). As the law then stood the prosecution could not have been allowed to cross-examine under that proviso in R v. Lovett. It may be supposed that it is in only very exceptional circumstances that an application by the prosecutor for leave to cross-examine under that proviso would be granted. Sir Rupert Cross[3] suggests as a possible instance a case in which two persons charged in the same proceedings each gave evide-

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1) (1973) 1 All E.R. 744; (1973) I WL.R. 241 2) (1911) 6 Cr. App. R. 106 3) Cross on Evidence, 5th ed. at p. 437

nce against the other, but, because they both had criminal records, neither cross-examined the other under Section 1 (f) (iii).

There is, however something to be said for the conclusion of the High Court of Australia that the Crown has no power to cross-examine under an identically worded proviso - that was the decision in Matusevich v. R [1] - the decision turned in part on the absence of a statutory requirement of an application for leave to cross-examine such as is required in the equivalent to Section 1 (f) (ii) in Section 399 of the Crimes Act of Victoria.

(9) SECTION 1 (f) AND SECTION 5 (2) (d) OF THE NEW-ZEALAND ACT 1908

I do not find it necessary to recapitulate the provisions of Section 1 (f) of the English Criminal Evidence Act, 1898, since they have just been extensively discussed.

Proviso (d) to Section 5 (2) of the New Zealand Act, 1908, states: "A person charged and called as a witness in pursuance of this subsection in pursuance of this subsection is liable to be cross-examined like any other witness on any matter, though not arising out of his examination-in-chief: but so far as the cross-examination relates to any previous conviction of the person so charged, or to his credit, the court may limit the cross-examination as it thinks proper, although the proposed cross-examination may be permissible in the case of any other witness."

The contrast between this proviso, which has remained unchanged in substance since 1893 [2] and which places the matter entirely within the

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1) (1977) 51 A.L.J.R. 657; (1977) 15 ALR 117 2) See the Criminal Code Act 1893, S.398 (3) and (4), repealing S.2 (3) of the Criminal Evidence Act 1889, which was an attenuated version of S. 1 (f) of the English 1898 Act, enacted 9 years later.

trial judges discretion, and Section 1 (f), which lays down detailed rules as to when a prisoner's past misconduct can be put to him in cross-examination, is obvious. The first and perhaps the most important difference, is that while Section 1 (f) expressly prescribes the conditions necessary to be fulfilled before an accused may be cross-examined, in New Zealand the matter is left to the trial Judge as one of discretion. Then in England as in some other Commonwealth countries, the text forbids any question tending to show that the accused has "committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character." In New Zealand, the questions excluded are those relating to any previous conviction of the accused, or to his credit. Perhaps however, there is little difference, in the actual application of the statutes, in the area covered by the two sections, it is in the discretion given by the New Zealand Act that the important difference lies. It should, however, be noted that a trial judge in England has, as we have seen, a considerable discretion exercisable by him within the frame-work of Section 1 (f), and in both jurisdictions there is an over-riding discretion to refuse to allow evidence which, though technically admissible, would have a prejudicial effect upon the accused out of all proportion to its probative value. Even so, the contrast remains, and it might have been expected that the New Zealand courts would treat each case coming before them as one of the first impression and decline to treat the English cases interpreting Section 1 (f) of the Criminal Evidence Act 1898 as persuasive autho-

rities.

It is clear from the wording of the New Zealand statute that it confers a much wider discretion on a New Zealand judge than that permitted to English judges by Section 1 (f). The desire for a degree of precision in stating the law and for some uniformity of approach by trial judges have, however, proved too strong and somewhat surprising result has been stated as follows: "We think that, although the matter is, in New Zealand, one of discretion, the limits prescribed by the English statutory position so evolved as a compromise should, in general, be observed in the exercise of the discretion"[1]. This statement is contained in the judgement of the Court of Appeal in R v. Clark[2], where it was observed that there may still be cases outside the limits set by the English Act in which the discretion should be exercised in favour of allowing the cross-examination.

Thus it remains now for us to deal with cases in New Zealand outside the limits of Section 1 (f) in which the court ought to exercise its discretion in favour of allowing a proposed cross-examination of an accused person. In R v. Clark, the accused had not sought to establish his own good character, nor had he attacked the veracity of witnesses for the Crown. All he had done was to present a version of the transaction, alleged to constitute either theft or receiving, which did not contradict the statements of witnesses for the Crown except upon minor relatively unimportant points. The Court

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1) The reference was to Viscount Sankey LC's observation in Maxwell v D.P.P. (1935) A.C. 309; 317 ,2) (1953) N.Z.L.R. 823. Cf The position in New South Wales; Curwood v R (1944) B 9 C.L.R. 561; and R v Woods (1956) 56 S.R. (NSW) 142

of Appeal accordingly held that the accused had not put his credibility in issue "to a degree that made it necessary or desirable to have his criminal record disclosed to the jury."

It must be said that the difficulty with the provision of the New Zealand statute - Section 5 (2) (d) of the Evidence Act, 1908, and Section 1 (f) of the Criminal Evidence Act (U.K.) - which has most exercised the minds of the judges has been the extent to which the defendant who has entered the witness-box can attack the evidence of the prosecution without losing his shield. In the terms of the English statute he will lose his shield if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution. It is perhaps the meaning of "imputation" which has caused the greatest difficulty. In England, both the Court of Criminal Appeal and the House of Lords have experienced fundamental changes of mind on the type of imputation which would be sufficient to deprive the defendant of his shield. In New Zealand, it appears there is some conflict between the courts about the correct meaning of "imputation" and moreover there is the further difficulty of reconciling the principles contained in some of the leading New Zealand cases with those expressed in the most recent House of Lords decision - Selvey v. D. P. P.[1].

In R v. Johnston[2], the defendant was charged with indecent assualt on a six-year-old girl. He denied part of the girl's evidence and the trial judge allowed the prosecution to cross-examinae him on his record. The Court of Appeal dismissed his appeal against conviction.

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1) (1970) A.C. 304 2) (1956) N.Z.L.R. 516

On the cross-examination point the Court said: "The appellant in evidence denied the material point of the girl's story so that his credibility as a witness was in issue, and his previous convictions for dishonesty were relevant thereto"[1]. No authority was relied on in support of this principle except that the Court stated that R v. Clark[2] had been cited to it. It is not apparent from the judgement for what principle the Clark case was cited, but it will be recalled that R v. Clark was inter alia Court of Appeal authority for the proposition that, in general, the New Zealand courts should follow English law and practice. If this principle had been drawn to the Court of Appeal's attention in R v. Johnston, one might have expected to find at least some reference to the English statute, a consideration of Court of Criminal Appeal authorities directly in point for a corresponding situation in English law and, if the New Zealand court was still determined to reach a result contrary to that obtained in England, some guidance on the reasons for the departure.

It is important to point out that there is one material distinction between he facts of the Clark case and those in R v. Johnston. In the former, the defendant did not challenge the evidence of the prosecution witnesses but merely put forward an explanation which, though consistent with their testimony, would, if believed, have established his innocence. No question, then, arose of his having cast imputations on the character of the prosecution witnesses. It is equally important to find out what part of the judgement in R v.

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1) Ibid at 518 2) (1953) N.Z.L.R. 823

Clark may have contributed to the result in the Johnston case. A test which the Court of Appeal appears in the earlier case to have thought appropriate for deciding whether the defendant should be cross-examined on his record was whether the accused had put his credibility in issue to a degree that made it necessary or desirable to have his criminal record disclosed to the jury[1]. The test of placing credibility in issue was applied in the Johnston case. It is submitted that this test is somewhat unhelpful and misleading. In any case, where there is an issue of fact between the prosecution and a defendant who gives evidence in the witness box, the defendant's credibility is in issue. It is not a question of degree. His credibility is no more nor less in issue, whether he accepts the prosecution witness's story and gives an explanation consistent with innocence, or denies the prosecution's story. His credibility can hardly be said to be more in issue because he shows that a prosecution witness is thoroughly unreliable and untruthful. The weight of the evidence against the defendant may make it easier or more difficult to believe his story but this does not mean that his credibility is any more or less in issue. While the prosecution maintains that the defendant has committed the deeds which make up the crime and while the defendant denies this, his credibility is in issue. To talk in terms of the degree to which a defendant puts his credibility in issue is to add little to the statutory formulation in Section 5 (2) (d) and to remove the element of a reasonable certainty which the Court of Appeal has achieved by incorporating English law

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1) R v Clark (1953) N.Z.L.R. 823 at 831

in the application of its discretion.

Johnston's case and the test of putting credibility in issue were relied on by the Crown in R v. Leadbitter[1]. In that case the accused denied in cross-examination a conversation he was alleged to have had with police constables when apprehended, and the Crown Prosecutor thereupon obtained leave to cross-examine as to previous convictions. The accused had not, however set up his own good character in cross-examination in-chief, nor had he at that stage impugned the veracity of the Crown witnesses. The Court of Appeal criticised counsel's cross-examination which had produced the denial, since it could have been intended only either to confirm a position which the appellant had not until then denied, or to promote a conflict between the appellant's evidence and that of witness for the Crown[2] which would allow his previous convictions to be put to the appellant. In all the circumstances the trial judge had exercised his discretion wrongly, and the Court ordered a new trial[3]. In reaching this conclusion, the Court of Appeal did not find it necessary to refer to Johnston's case, nor appropriate to invoke the test of putting credibilit in issue. It is significant also that the view expressed in R v. Clark[4], that New Zealand courts should follow English law and practice was approved in R v. Leadbitter.

The decision in R v. Leadbitter[5] was followed in R v. MacLeod[6]. In that case, an attack was made on the complainant's character, and the accused suggested that she was actuated by spite and was endeavouring

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1) (1958) N.Z.L.R. 336 at 339 2) Cf R v Eidinow (1932) 23 Cr. App. R. 145 3) (1958) N.Z.L.R. 336 at 343 4) (1953) N.Z.L.R. 823 5) (1958) N.Z.L.R. 336 at 339 6) (1964) N.Z.L.R. 545

to implicate him. The Court of Criminal Appeal doubted whether the mere fact that there was a strong conflict of evidence between the defendant and a number of prosecution witnesses would have been a sufficient reason for allowing cross-examination on the accused's record. R v. Johnston[1] was regarded as decided on a very special set of facts.

R v. Fisher[2] was decided on the line of reasoning in Leadbitter and Macleod. In the case, the Court of Appeal referred to R v. Flynn[3] and stressed the paramount consideration of having a fair trial. The appellant appealed against his conviction in the Supreme Court at Hamilton on two counts of breaking and entering business premises in the town of Huntly and his sentence to preventive detention. In the notice of appeal several grounds were raised in support of the appellant's contention that he had been wrongly convicted, but the only one which was proceeded with was that the Judge had wrongly exercised his discretion in allowing the prosecution to cross-examine the appellant about his previous convictions. The question arose in these circumstances: An important Crown witness on the appellant's second trial was a Miss Stevens. In the earlier trial she had given evidence for the defence and now, on the second trial, she was helping the Crown to secure a conviction. In these circumstances counsel for the appellant felt obliged to attack her character. This he did, first by cross-examining a police officer with a view to showing that the young woman was a prostitute and had, moreover, acted as a police agent. Then when Miss Stevens herself came to be cross-

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1) (1956) N.Z.L.R. 516 2) (1964) N.Z.L.R. 1063 3) (1961) 3 All E.R. 58

examined she was severely questioned on both these topics and it was further suggested that she had on occasions received money from the police in consideration of information received. Both these allegations she denied. The judgement of the Court was delivered by North P., who after reviewing the facts as above said[1]: "There can, we think, be no doubt that, even under the English section, the course taken by the defence rendered the evidence of previous convictions legally admissible. But even so, it has been pointed out in the English cases with increasing firmness that the matter is still one for the discretion of the trial Judge, who before giving leave should consider most anxiously 'whether although legally admissible, it was desirable, having regard to the paramount consideration of having a fair trial, that it should be admitted'[2]: This for the reason that it has been found, as a result of long experience, that the admission of evidence of previous convictions is always highly prejudicial and often enough 'absolutely fatal'[3]. In New Zealand, while the whole matter is one of discretion, the limits prescribed by the English Act will generally be observed in the exercise of discretion."[4]

Professor Lanham has argued that where the defence necessarily involves an attack on the character of a prosecution witness, such an attack or imputation will not deprive the defendant of his shield in New Zealand[5]. That would be a rule, not the statement of a discretionery power, and the argument of course involves denying the authority of Selvey v. Director of Public Prosecutions[6] in New

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1) (1964) N.Z.L.R. 1063 at 1064 2) R v Flynn (1961) 3 All E.R. 58, 62, 63; 3) See Channell J. in R v Preston (1909) I K.B. 568 at 575 4) R v MacLeod (1964) N.Z.L.R. 545 5) "Cross-examination under S,5(2)(d) of the Evidence Act 1908 - Imputation and Necessity" - (1972) 5 N.Z.U.L.R. 21 at p.34 6) (1970) A.C. 304

Zealand. In R v. Macleod, the Court of Appeal seemed to have approved the statement of principle submitted by Professor Lanham above. For the present purposes the significance of this is that the New Zealand Court of Appeal appears to have rejected any proposition, that an allegation that one of the prosecution witnesses was the true author of the crime is an imputation within the meaning of the statute. One can then accordingly submit that the Court of Appeal as far back as Macleod recognised the principle that, where it is necessary for the defendant to attack the character of a prosecution witness, he is not to be regarded as making an imputation within the terms of the statute. But it is submitted also that the Court of Appeal is tending to emphasise the discretion conferred by proviso (d) of Section 5 (2), and to downplay the proposition in R v. Clark [1] that the English limits will "in general be observed". Thus in R v. Manihera [2], one Sim helped the police to set up a trap for Manihera. He was cross-examined as to whether he took drugs himself or went to drug parties. He denied it. The trial judge granted leave to the Crown to cross-examine the accused on his 21 convictions for dishonesty because of the imputations against Sim. The Court of Appeal held that leave should not have been given. The accused was entitled to test the validity of Sim's assertion of public-spirited co-operation, and it could not be said that there was a "deliberate serious attack" on Sim's character. Yet upon those facts arising in England there is no doubt that they would be imputations in terms of Selvey's

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1) (1953) N.Z.L.R. 823 2) N.Z.C.A., unreported, 20 August 1975

case. The New Zealand Court of Appeal moved directly to the exercise of discretion.

An important distinction was made in R v. Fox[1]. When it is sought to cross-examine an accused as to credit, the courts should in general follow the principles laid down in the English decisions. But when the evidence is relevant to some matter in issue in the trial, the English practice will not furnish a bar to such questions. In such a case the court in exercising its discretion considers only whether it is fair in the circumstances of the particular trial that the questions should be asked. In that case, the appellant was accused of breaking and entering the Bank of New South Wales at Auckland and gave evidence in his own defence. The prosecution was granted leave by the Judge to ask the appellant questions concerning another burglay of another Bank of Masterton and whether he had not proposed to H a crown witness that H should be a party to the Masterton burglary, and further whether they had not actually committed such burglary together and had pleaded guilty thereto and been convicted. H had testified to a conversation between himself and the appellant in which the latter had described in detail the method he had used to break into the Bank of Auckland. These details harmonised with the police evidence. H had been prepared to say, had he been asked that the reason why the appellant had described such method was to convince H that the plan to break into Bank at Masterton was feasible. As H had been returned to Wellington, by agreement part of H's deposition containing the latter fact was read. The

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1) (1973) N.Z.L.R. 458

appellant denied the testimony of H concerning the conversation and also the part of H's deposition which was read, but admitted that they had pleaded guilty and been convicted of the Masterton burglary. The Court held that in cases in which leave is sought to cross-examine an accused as to credit, the court in exercising the discretion conferred by Section 5 (2) (d) of the Evidence Act, 1908, will in general (but not necessarily in every case) follow the principles laid down in the English decisions. Turner J., observed as follows[1]:

"In New Zealand, the earlier decisions of this Court to which we have referred did not go so far as to enjoin upon New Zealand Judges that they must be regulated by every nuance of the English Act and every subtlety as to its interpretation which may follow from decisions of English Courts. The New Zealand decisions do no more than enjoin upon trial judges a general compliance with the limits on cross-examination laid down in the English statute. They all expressly recognised the fact that there may be cases in which leave may be granted in New Zealand, when in England it would not be granted, remembering that here the statute does not in terms (as in England) positively forbid the cross-examination, but invests the Judge with a discretion, which as far as the words of the statute go is an untrammelled discretion. The New Zealand decisions do not purport completely to shut the door on the exercise of this discretion, and to restrict it in all cases of literal compliance with the provisions of the English statute as interpreted in English Courts. The discretion

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1) (1973) I N.Z.R.R. 458 at 468

is still there. Of course, in the ordinary run of cases, in which no more is sought than to cross-examine an accused as to credit, and thus to damage his credibility, the principles which have been laid down in successive English decisions will, in general (though we must be careful still to say, not necessarily in every case) be faithfully applied."

It was further held in the same case - R v. Fox[1] - that when the evidence sought to be adduced in cross-examination of the accused is evidence relevant to some matter in issue in the trial, then the English practice will not furnish a bar to such questions. In such a case, the Court in exercising its discretion considers only whether it is fair in the circumstances of the particular trial that the question should be asked. Turner J., explained as follows[2]: "At the end of the discussion of the discretion given by Section 5 (2) we are brought back to the point at which that discussion began - the paramount importance of relevance as a test of admissibility. While in England it has been necessary, on a technical construction of the English statute, to hold that relevant evidence is excluded by the provisions of English section, if the evidence is sought to be adduced by the cross-examination of the accused on one of the topics specified in the statute, we are mot in New Zealand constrained by wordss of exclusion in the statute. In this country the Judges are given a discretion, and we are prepared to hold that when the evidence sought to be adduced in cross-examination of the accused is evidence relevant to some matter in issue in the trial then the English

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1) (1973) I N.Z.L.R. 458 2) Ibid at 469

practice will not furnish a bar to such questions. In such a case the trial judge, in exercising his discretion, considers only whether it is fair in the circumstances of the trial that the question should be asked. In the trial which forms the subject of this appeal, Speight J., considered this; he exercised his discretion in favour of the Crown. In doing so we think that he did no more than follow a practice which has generally been adopted by trial Judges in New Zealand in the past; this practice now receives the formal approbation of this court." The appeal was dismissed.

A difficulty arises from the terminology of Section 5 (2) (d). It speaks of cross-examination relating to "any previous conviction of the accused, or to his credit ." What about previous charges, and bad but not criminal conduct? On the face of it these are not affected, and cross-examination of an accused along those lines would seem to be covered by the common law. But it may be that the courts will not adopt such a strict construction, and that they will regard Section 5 (2) (d) as conferring a discretion to allow or disallow cross-examination about previous charges and previous bad conduct[1]. Certainly, the justification for giving the court a discretion in this area applies to the different forms of cross-examination which may prove fatal to the accused.

One important question that is pertinent to be asked is that what can one regard is the relation between the two discretions exercisable by the judge? There is the discretion, conferred by proviso (d),

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1) Cf dicta of Turner J in R v Fox (1973) I N.Z.L.R. 458, 467

as it has been judicially interpreted to allow further cross-examination which would not be allowed in England under Section 1 (f); and there is the overriding discretion to disallow evidence which, though technically admissible, has a prejudicial effect out of all proportion to its probative value. It is not to be thought that in a practical world the courts will carefully discriminate between the two discretions, but their co-existence does not make it any easier to state the law. It is, however, clear that, once a foundation has been laid on the facts, consideration should then be given to the question whether or not to give leave to cross-examine the accused as to previous convictions, having regard to the prejudice involved: it is improper to give leave, simply because imputations have been made, without regard to that question. North P., in R v. Fisher[1] said ... "the case for the appellant in substance was this: That the reasons given by the learned trial Judge showed that he did not really bring his mind to bear on the different considerations which required to be considered in determining whether leave should be given. We think that counsel is right when he said there are passages in the written reasons given by the Judge which give support for this contention, for, having reviewed the nature of the cross-examination, he said: 'In these circumstances, in my view, the nature and conduct of defence is such as to involve imputations on the character of Stevens, a witness for the prosecution, and if the defence is conducted in such a way then it is proper that cross-examination of the accused as to previous convictions should be allowed'. That is not the correct

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1) R v Fisher (1964) N.Z.L.R. 1063, 1064-5

approach. The true view is that a foundation having been laid on the facts, it was proper that consideration should then be given to the question whether or not to give leave to cross-examine the accused as to previous convictions having regard to the prejudice involved."

(10) THE POSITION IN NEW SOUTH WALES

It is clear from the provisions of the Crimes and Other Acts (Amendment) Act 1974 that New South Wales has adopted a legislation designed to give effect to the general policy of the UK legislation of 1898, but in rather different terms as it is more detailed.

The new Section of the Crimes Act 1900 provides as follows: Section 413 A (1) "Subject to this section and section 413B where in any proceedings an accused person gives evidence he shall not in cross-examination be asked, and if asked shall not be required to answer, any question tending to reveal to the Court or jury - (a) the fact that he has committed, or has been charged with or convicted or acquitted of, any offence other than the offence charged; or

(b) the fact that he is generally or in a particular respect a person of bad disposition or reputation.

(2) Subsection (1) shall not apply to a question tending to reveal to the Court or jury any fact such as is mentioned in subsection (1) (a) or (b) if evidence of that fact is admissible for the purpose of proving the commission by the accused of the offence charged.

(3) Where, in any proceedings in which two or more persons are jointly charged, any of the accused persons gives evidence, subsection

(1) shall not in this case apply to any question tending to reveal to the Court or jury a fact about him such as is mentioned in subsection (1) (a) or (b) if evidence of that fact is admissible for the purpose of showing any other of the accused to be not guilty of the offence with which that other is charged.

(4) Subsection (1) shall not apply if - (a) the accused person has personally or by his counsel asked any witness for the prosecution or for a person jointly charged with him any question concerning the witness's conduct on any occasion (other than his conduct in the activities or circumstances giving rise to the charge or his conduct during the trial or in the activities, circumstances or proceedings giving rise to the trial) or as to whether the witness had committed, or has been charged with or convicted or acquitted of, any offence; and (b) the Court is of the opinion that the main purpose of that question was to raise an issue as to the witness's credibility,

but the Court shall not permit a question falling within subsection (1) to be put to an accused person by virtue of this subsection unless it is of the opinion that the question is relevant to his credibility as a witness and that in the interests of justice and in the circumstances of the case it is proper to permit the question to be put.

(5) Subsection (1) shall not apply where the accused person has given evidence against any person jointly charged with him in the same proceedings."

Section 413 B (1) "In any proceedings an accused person may -

(a) personally or by his counsel ask questions of any witness with a view to establishing directly or by his implication that the accused is generally or in a particular respect a person of good disposition or reputation;

(b) himself give evidence tending to establish directly or by implication that the accused is generally or in a particular respect such a person; or

(c) call a witness to give any such evidence,

but where any of these things has been done, the prosecution may call, and any person jointly charged with the accused person may call, or himself give, evidence to establish that the accused person is a person of bad disposition or reputation, and the prosecution or any person so charged may in cross-examining any witness (including, where he gives evidence, the accused person) ask him questions with a view to establish that fact.

(2) Where by virtue of this section a party is entitled -

(a) to call evidence to establish that the accused person is a person of bad disposition or reputation, that party may call evidence of his previous convictions, if any, whether or not the party calls any other evidence for that purpose; or

(b) in cross-examining the accused to ask him questions with a view to establishing that he is such a person Section 413A (1) shall not apply in relation to his cross-examination by that party."

It is fair to view the above provisions as a mordern attempt to

resolve the problems discussed under the 1898 Criminal Evidence Act. One of the things of interest is that the prosecution may attack the character of the accused by leave where the accused challenges the character of a prosecution witness or a witness for a co-accused, and as of right where the accused puts his own character in issue and when the accused gives evidence against a co-accused. It is clear by the provision of Section 413A (4) that the legislature intends that an accused shall not be put at a disadvantage if as part of the defence it is necessary to make allegations against a prosecution witness. It is of interest that the accused does not lose the protection of Section 413 A (1) where the imputations on prosecution witnesses are made otherwise than in cross-examination, as for example in his evidence or his unsworn statement.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

Thayer, in "A Preliminary Treatise On The Common Law"[1], stated that the law of evidence was "ripe for the hand of the jurist ... for a treatment which, beginning with a full historical examination of the subject and continuing with a criticism of the cases, shall end with a restatement of the existing law and the suggestion for the course of its future development."

Having fulfilled the initial stages of this statement one can now make a brief statement of the existing law and attempt to make some suggestions for the course of its future development, such as are based upon reason and solid principle.

The approach taken as indicated in the earlier discussion to the admissibility of similar fact evidence has been to focus upon the interaction of the two factors of the probative value and risk of prejudice. It is maintained that any satisfactory account of the law relating to the admissibility of similar fact evidence must treat the issues of probative value and risk of prejudice as the key issues in comparison with which other factors are to be regarded as largely incidental. The aim of the discussion of similar facts evidence has been to provide such an account. A set of headings has been utilised, not as a key to admissibility, but merely to conveniently group together types of case in which the probative value of similar fact evidence is often sufficient to justify admissibilty. It is a

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1) Boston, 1898; Reprint: 1969

mistake to think that any set of categories or distinctions can give a clear indication of when similar fact evidence will be admissible.

It may be readily conceded that neither probative value nor risk of prejudice can be measured with any degree of exactitude. The potential for the prejudice possessed by an item of evidence is often largley a matter of guess work. The probative value of an item of evidence is often equally difficult to estimate, and is dependent upon a large number of variables. In the present context the key variables are the nature of the similar fact evidence itself, the issues in contest in the case, and the other evidence presented in the case. In many of the cases which have been considered, a slight variation in the facts would have led to a different result.

The Common laws concern with and difficulty in resolving the problem of the admissibility of evidence of misconduct on other occasions, otherwise refered to as similar facts evidence, comes as something of a surprise to the layman. However, to a legal mind, it is to the credit of the common law that it established, not without difficulty and inconsistency, a fundamental principle that an accused is to be tried not for what he is but for what he has done, and subsequently, not merely for what he has done but only for what he has done in a particular mental state. Evidence of other misconduct may be very helpful - or as the lawyer may say, highly relevant in determining either of these two issues, but evidence of other misconduct may also be prejudicial. The greatest feature of the common law criminal system is that it is not only concerned with reaching the

right result but is equally concerned with reaching the right result by the right process. Not, of course, that we have always succeeded or are always succeeding, but we try.

There are two important things that must be made clear; in the first place, similar fact evidence is always circumstantial in nature. Even if believed, it does not neceessarily rationally lead to the conclusion that the accused is guilty - he may have changed his ways, he may be the victim of an unfortunate chain of events, he may have been "set-up" by the police, by the victim, by a third party - precisly because he is known to have acted similarly on other occasions. It casts a heavy tactical onus of disproof on to the accused in the minds of the jury, however well it is instructed. Any evidence, the probative value of which lies circumstantially via the route of character or disposition, may be just enough to resolve any reasonable doubt that the trier of facts may have. Thus similar fact evidence must always be supplementary; it can never, in itself be the entire case for the prosecution.

In the second place, even if the accused is the right person and did commit the offence, he is still entitled to the right of requiring the prosecution to prove his guilt, that is, to prove all the requisite elements of the offence beyond reasonable doubt. If that right is to be preserved, we cannot accept short cuts in the process by facilitating the finding of guilt simply because the accused is a bad person who ought to be found guilty of something.

It is clear that when evidence of misconduct on other occasions should or should not be admitted depends so much on variables it is the trial judge who must make the decision in each case. No one can set out the rules in strait-jacket form because there are none. But an understanding of the difficulties and the applicable principle will greatly facilitate his task. The trial judge must be neither too quick to grasp at the matters of minimal relevance nor too defensive about a jury's perceived chain of reasoning. Many of the cases - in fact, - most of the cases - are, it will be perceived, decisions of appellate tribunals. An appellate tribunal must be neither too quick to substitute its own view of the relevance of similar facts evidence in the context of all the evidence for that of the trial judge, nor too quick to assume that a properly instructed jury would not treat similar facts evidence with the careful scrutiny it must receive.

As a result, merely citing a precedent that evidence of a particular act or fact was held admissible to prove identity, or intent, or to rebut a particular defence, etc., is meaningless. It must be known why the evidence was admitted. The temptation to admit similar fact evidence which seems to fall so neatly into one of the pigeonhole categories established by judicial precedent can lead to the admission of prejudicial similar fact evidence which is not relevant. True probative value is often lost-sight-of.

It is important to note that when a case states that the evidence under consideration is admissible to prove intent, identity, or is

admissible to rebut a defence of accident, innocent association, etc., or that the evidence admissible (or inadmissible) notwithstanding a denial of the act, the force of that ratio or dicta can only have strength with respect to the facts and circumstances of that case. One should not blindly apply precedent. One should not take a dictum and apply it directly to the case under consideration without taking into account the facts of the other case, the manner in which the sufficiency of the logical probative relationship was derived from those facts and circumstances, and the issues therein raised. The logical inferences and their probative strength must be determined anew in each case. To show excessive respect, as Cowen and Carter[1] pointed out to the "judicial pronouncements, turn out of their context and elevated to the dignity and authority of dogma is dangerous". One need merely recall the development of the unwarranted extensions of Thompson v. R[2], or the development of the catchword, "innocent association" from R v. Sims[3]. We seem to have become obsessed with precedent.

However, since probativeness and admissibilty can change with the slightest movement of the kaleidoscope of facts, the value of precedent in this area of the law, other than stating basic principles (which in many instances it has failed to do), can only serve an exemplary function - an example of logical inferences and assumptions drawn and made by other courts, which in the present case is to be utilised as a comparison, as an aid to unveil the reasoning process,

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1) Essays On The Law of Evidence (Oxford, 1955) p. 156
2) (1918) A.C. 221 (H.L.) 3) (1946) K.B. 531 (C.C.A.)

so that, possibly, on the facts of present case, a similar reasoning process can be applied to prove or refute, the existence of the fact or proposition at issue. Precedent should not be used blindly in lieu of the reasoning process. As Heydon[1] pointed out: "Reported similar fact cases of which there are vast numbers are notorious for disputes and doubts about rules of law, though most of them are probably rightly decided. Opinions differ as to which are rightly decided largely because the question is one of relevance and therefore of degree. Not too much weight should be placed on seemingly identical prior authorities; like modern negligence cases, these are decisions of fact dressed up as decisions of law. They have very little binding effect on latter courts. Dicta or even decisions in one case may be inapplicable to later cases because they are based on unexplained assumptions about which issues are relevant and how striking similarities are."

In an observation by Stow, he said [2]: "Rules which are devised with the idea of relieving people of the trouble of thinking generally end by becoming a troublesome fetter on the reason." Precedents, when treated in a manner analogous to "rules" lead to the same result. And as Thayer pointed out, while the law of evidence may, at times, be full of good sense, it is a good sense "... that occasionally nods, that submits too often to a mistaken application of its precedents, that is often short-sighted and ill-instructed, and that needs to be taken in hand by the jurist, and illuminated, simplified, and invigorated by a reference to general principles."[3]

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1) Cases and Materials On Evidence (London) (1973) at p.262
2) "Evidence of Similar Facts" (1922) 38 L.Q.R. 63 at 73 3) Thayer, A Preliminary Treatise at p.509

Adherence to general principles of reasoning in every case would relieve this area of the law of much of its difficulties. Not only should the reasoning process be capable of expression in a prior case, but the reasoning process and the generalisations and assumptions upon which it relies, should be capable of expression in any case at bar. In fact, one Americain writer - Lacy - has suggested that the prosecution should be required to work out the chain of reasoning leading from the proferred evidence to the issue sought to be proved.[1] By that means, the relevancy and sufficiency of the evidence will be exposed, rather than evidence being admitted perhaps because of some vague notion that it has some value to the case. In fact, in some American jurisdictions,[2] the court has ruled that the state is required to give notice of any similar fact evidence which it intends to use and the issues to which it is thought probative; that "prerequisite to the admissibility of the evidence is a showing by the state that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behaviour, and that it serves the actual purpose for which it is offered."[3]

This latter requirement would force the court to examine the relevancy and sufficiency of the evidence, especially with respect to the issues sought to be proved or refuted, and would also force the court to take into account the negative concept of "need". Precise

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1) "Admissibility of Evidence of Crimes Not Charged In The Indictment" (1952) Ore. L.R. 267 at 285-6 2) See "Case Comments" (1974) 2 Fla.S.U.L.R. 202 at 204; Jones, "Other Crimes Evidence in Louisiana" (1973) 33 La L.R. 614 at 625; State v Prieur, 277 SO.2d.126 (La. 1973); State v Pillstrem 149, N.W. 2d 281 (Minn. 1967) 3) State v Prieur Ibid; "Case Comments", Ibid.

predictability cannot, of course, be expected in an area in which basic policy considerations compete. It is submitted that similar fact evidence is such an area, and that it is a mistake to attempt to solve the question of admissibility by reliance upon any simple verbal formula or set of distinctions.

Since the basic thrust of this conclusion is that the question of admissibility of misconduct on previous occasions should be focused upon the interaction of the two factors of probative value and risk of prejudice - and not whether a specific defence has arisen, nor whether certain issues or catch-words will automatically allow the prosecution to adduce similar fact evidence in chief, nor whether the reasoning process takes a particular form of legal reasoning, I would strongly recommend an abolition of the categorisation approach altogether. We have all after all witnessed the problems created by the categorisation approach. It has led to undue adherence to precedents and to reasons for admissibility which have often been based on faulty reasoning. Absolute "rules" have been developed leading to hair-splitting distinctions among the various cases and obfuscation of the true principle involved. Unfortunately, the circumstances which safeguard the accused's right became ossified into rigid and close rules. Thus the categorisation approach has limited the scope of the study of similar facts evidence and in some ways actually complicated it. The question then is, of what effect will its abolition be to the central issues of probative value and the risk of prejudice. Apart from eliminating those problems enumerated above,

which had accompanied categorisation, one other thing is certain, and that is that each case can now be considered on its facts and merits, rather than by mere "pigeon-holing", which sometimes results in irrelevant evidence being admitted and in some other cases results in some relevant though greatly prejudicial evidence being admitted. Categorisation places emphasis on precedent which the judges are compelled to follow, and so its abolition will obviate the problems that go with precedent which have already been discussed. Thus if the recommendation for the abolition is adopted, counsel and the judges would be able to apply themselves strictly to the cases before them rather than pre-occupy themselves with enforcing precedent through cataloguing of the cases under the separate headings. The consideration for the Court should be whether at any given point in a trial a specific issue has substantially appeared so that it can safely be said that such is a real issue in the trial, and further of whether at the same given point in time, the proferred evidence is sufficiently probative to affect the apparent probabilities of the existence of that issue. It is basically a two-step process. As a result of the course that the proceedings may take, an issue may substantially appear at a given point in time, whether in the case for the prosecution or in the case for the defence, or it may be an issue from the outset of the trial, yet, at that point in time, the similar fact evidence may not have sufficient logical probativeness to that issue. In result, admissibility is denied. However as the

trial progresses, and other evidence is adduced, there may come a point in time where, in the contest of the evidence as it then stands, the similar fact evidence has attained the requisite degree of relevancy to be admissible. Thus, the question of admissibility must always be considered in the context of the circumstances and peculiarities of a particular case being considered. "The same similar fact evidence may be admissible in one context and inadmissible in another; the slightest movement of the kaleidoscope of facts creates a new pattern which must be examined afresh."[1]

The principles of admission are basically those of relevancy theory and counterbalancing prejudice. Relevancy, though simple, can be difficult to apply if not understood. One writer claims that relevancy, "... is a concept that is difficult to define in a really helpful way. Relevance is easier to recognise than it is to describe. It is reminiscent of U.S. Supreme Court Justice Potter Stewart's remark about obscenity: 'I cannot define it but I know it when I see it".[2]

It is my view that if the categorisation approach was abolished, the study of similar fact evidence would be less complicated, easier to fathom the rationales behind the decisions and of course more interesting. The admissibility of similar fact evidence would be more realistic and less parochial and rigid, as emphasis would shift to the correct quarters; what is needed is a clear recognition of the competing policies, coupled with a willingness to attempt the difficult task of evaluating the probative value and the potential for

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1) Hoffmann, "Similar Facts After Boardman" (1975) 91 L.Q.R. 293 at 294 2) Waltz, Criminal Evidence (Chicago, 1975) p.49

prejudice possessed by the evidence. And it is also hoped that one could avoid excessive rigidity, of the kind illustrated by a typical decision of the Supreme Court of Massachusetts[1], where it was held that; "If the testimony tended to show nothing more than an act of improper familiarity and not a substantive act of adultery on that occasion, such evidence would be admissible (to prove the concurrent adulterous disposition of the defendant and the particepes criminis)." It is difficult to find any logic in accepting evidence of a mere previous "act of improper familiarity" and rejecting similar fact evidence of "a substantive act of adultery" as being the "strong(est) evidence" of an adulterous disposition. The question of admitting similar facts evidence is after all practical rather than academic.

Though the fires of controversy on similar facts evidence seem to have engendered more heat than light, one aspect has surprisingly and regrettably been neglected, and that is the scientific approach. McCormick is one of the few writers to note that "the policy basis of the ... rule ... is so doubtful that the courts may profitably be alert to the future developments of these scientific studies, in appraising the desirability of maintaining the legal barriers."[2] He mentions a pioneer article by James and Dickinson[3], showing that "a limited group of persons have a special predisposition for accidents. They are 'accident prone'." Quite surprising is their finding that as to road traffic accidents, "with the exception of vision ... most

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1) Commonwealth v Thrasher 11 Mass. 450, 452 (1858) 2) McCormick, Evidence, at p.326 3) "Accident Proneness and Accident Law" (1950) Harv. L.R. 769

of the studies show little correlation between physical characteristics and accident rate." Besides phycho-motor characteristics, age and experience, the personality traits of the driver were found to be of major importance.[1] In another article by Marsh, entitled "What kind of Driver Are You?"[2], it is noted that the chances of a driver's overcoming a potential accident "depends upon the class to which that driver belongs .. much more than upon his quickness ... (I)t is possible to classify every driver according to his skill, ignoring his sex, age and experience. Most important, a driver who belongs to one group will probably stay in it for the rest of his life." An American scientist is cited as saying that "in spite of all efforts, a bad driver cannot turn into a good one ... . We have conducted re-examinations of volunteers after an interval of two years, and found that their driving ability had hardly changed." Another writer mentions that "recent medical research has shown that 'accident proneness' may be an innate characteristic of some individuals and a personal phenomenon independent of any question of responsibility, conscious action or blame-worthiness."[3] Dealing with the "evidentiary aspects" of their study, James and Dickinson call for a reconsideration of the rule excluding evidence of similar facts since recent studies afford a scientific basis for proper evidence of accident proneness to be admitted to show carelessness[4]. Nevertheless, regarding the uncertainty of the provisional researches in this area, the writers do not seem to suggest the total abandonment of the rule. As McCormick[5] pointed out, proof should be by "results of specific tests

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1) "Accident Proneness and Accident Law" (1950) 63 Harv. L.R. 769 at 772-775. The same relates to Intellegence. Cf U.S. Bureau of Public Roads, Highway Accidents, (1938) 2) Yedioth Aharonot, December 11, 1970 at p.8 of the Weekly Magazine. 3) Bristol, "Medical Aspects of Accident Control" (1936) 107 A.M.A.J. 653,654 4) James and Dickinson see Infra at 793 5) McCormick, Evidence, p.32

of the individual in question ... if introduced through the testimony of a qualified expert," including according to James and Dickinson[1], "an expert opinion whether the individual was accident prone ... based on, or contributed by, a clinical interview and observation or a past accident record."

Of even greater significance are sex cases in which evidence of similar acts is admitted to prove performance of the act; its culpable character and identity of the agent. Here the evidence is admitted "as showing a disposition to commit the act charged."[2] If the relevant cases are read critically, many of them will be seen to fit into the established classes of admissibility. But the courts have even gone far beyond those classes , although pretending that the case falls within the exceptions of system, scheme or design.[3]

The Supreme Court of Arizona was pushed to the wall by dissenting judges who frankly admitted: "(T)he courts appear to be more liberal in admitting, as proof of guilt, evidence of similar sex offences than one who is charged with non-sex offences"[4]. As pointed out in an earlier discussion in this thesis and in several other works[5] this liberalism is probably attributable to the assumption that sex offenders have a high disposition towards recidivism. It must also be taken as the basis for the increasing statutory interference in the area of "sexual psychopathy".[6]. Serious doubts have been raised[7] and many consider it wrong to regard sexual offenders as a special group and would split it into several types: specific perversions,

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1) (1950) 63 Harv.L.R. at 793 2) Bracey v U.S. 142 F. 2d 85,88 (D.C.Cr. 1944) 3) Cf Comm. v Kline, 361 P.434, 65A 2d 348 (1949); See generally-Comment. (1949) 23 Temp.L.Q.133 4) State v Finley,85 Ariz.327,334,338 P.2d.790,795 (1959) 5) See Note (1951)39 Cal.L.R. 584; Trautman, "Logical or Legal Relevancy - A Conflict In Theory" (1952) 5 Vand.L.R. 385 at 400-1 6) See Annots. 24 A.L.R.2d.350; 25 A.L.R.2d.354 (1952); K Bowman, "Review of Sex Legislation and the Control of Sex Offenders in the U.S.ofA." (1953) 4 Int. Rev. of Crim. Policy 7) See P. Tappon, "Some Myths About the Sex Offender" (1958) 22 Fed. Prob; See also J. Gregg "Other Acts of Sexual Misbehaviour and Perversion as Evidence in Prosecutions for Sexual Offenders" (1965/6) 6 Ariz. L.R. 212, 231

such as exhibitionism, may be habitual and highly repetitive while others, such as rape are not.[1]

The conclusion to be drawn from the study of "accident prone" persons and "sex offenders" is disappointing. The former have not yet been adequately investigated, and although for the latter the data are quite abundant,[2] the courts seem to ignore them. This attitude may be due to condemnation of immorality and the desire to combat its recurrence, rather than to objective conclusions. Moreover, the judges argue that the scientific studies were not made in relation to adjudication and most of them ignore considerations which are material for a judge. Mutual distrust between members of the legal profession and behavioural scientists is well known[3]; however it is clear that in consequence much valuable material is wasted, while lawyers flounder in their own controversies over the Rule and its Exceptions.

Having seen the position of the "sexual offenders", another type of evidence for consideration is "(e)vidence of sexual conduct offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged."[4] It is interesting to note that Wigmore[5] suggested that in all rape cases psychiatric testimony relating to the state of mind of the victim should be admitted: "No judge should never let a sex offence charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician."[7]

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1) See F. Leppman, "Essential Differences Between Sex Offenders" (1941) 32 J. Crim. L.C. & P.S. 366 2) See a Bibliographical list Gebhard, Gagnon, Pomeroy & Christenson - The Indiana University Institute of Sex Research, "Sex Offenders" (1965) 877-82 3) See generally, G. Dession, "Psychiatry and The Conditioning of Criminal Justice" (1937-38) 47 Yale L.J. 319 4) Berger "Man's Trial, Woman's Tribulation: Rape Cases In the Courtroom" (1977) 77 Columbia L.R.1. at p.38 5) §924 at 737 7) Wigmore on Evidence, § 924a at 737

However problems of expert testimony in the court-room have been recognised as a general matter by Wigmore.[1] And Jerome Hall in "General Principles of Criminal Law"[2], when alluding to the appearance of the psychiatrist in the court-room made the comment:

"... we are plunged into the extremely complicated task of trying to establish the conditions of intelligible inter-communication among lawyers and psychiatrists ..."

There can be little doubt that, in many respects, the Criminal Law and psychiatric theory are at odds. At a fundamental level, a divergence exists regarding the process of volition itself. A significant comment may be found in the judgement of Jackson J., of the Kansas Supreme Court in the case of State v. Andrews[3], where it was stated that, "... it may be noted that Freudian psychiatrists tend to discount the existence of the capacity in the individual to exercise his free will. Perhaps it should be noted that there are other schools of psychiatry beside the Freudian. It is not for the lawyer to decide between these schools. We can only wish all of these learned men success in their quest for knowledge in a new field. But, the law has always insisted upon an exercise of will".

This dichotomy has manifested itself in the fact that the law, in devising criteria for criminal responsibility, omits psychological and sociological considerations which are regarded by medical experts as basic to any appreciation of human conduct. The most obvious example, of course, being so-called McNaughten Rules[4] which have,

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1) See generally Wigmore on Evidence, Vol. 2, "Testimonial Qualifications" Chap. XXIII at Pp. 633 et seq. 2) (1960) at P.452 3) (1960) 357 P. 2d. 739 at 747; see also e.g. Dusky v U.S. (1961) 295 F. 2d. 743; and Kwosek v State (1960) 100 N.W.2d. 399 4) R v McNaughten (1843) 100 CI and F.200. Cf Scotland - H. M. Advocate v Kidd (1960) J.C. 61, 70-71.

although formulated in 1843, remained the basic statement of the law of insanity in England to the present time. Even in jurisdictions where the matter is contained in a statute, the position is no more realistic.[1]

Psychiatrists as experts cause not the least of these problems[2]. One of the most problematic areas is that of terminology: what do psychiatric terms, which are used with little consistency by those in the profession, and with little agreement on their part[3] in labelling individuals actually mean? Would this approach serve further to confuse the jury rather than enlighten them?

Another problem which arises is that psychiatric evidence differs from other expert evidence, even other medical evidence, in its methodology. As Diamond and Louisell point out[4], the psychological sciences differ from most other scientific areas in that their subject matter is not visible. "The Investigator must therefore rely", they comment, "upon inferences made from derivatives: speech, non-verbal communication, actions, behaviour." Thus, the psychological sciences cannot truly be described as exact sciences, particularly as the scope of psychological experiment is necessarily limited. Therefore, since lawyers like to think of their own discipline as precise and logical, a further conflict immediately arises exacerbated, Glueck suggests[5], by events in the past which caused the psychiatrist to be regarded as a practitioner in, " ... such supposedly devious acts as hypnotism and animal magnetism; and it is nourished by the indubitable fact that mental medicine still

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1) See e.g., the Canadian Criminal Code S.16; the Tasmanian Criminal Code, S.16; the Queensland Criminal Code S.27 and the New Zealand Crimes Act (1961) S.23 2) See eg., J. Hall-General Principles of Criminal Law (1960) at P.452 3) See eg. Copeland, Cooper "Differences in Usage of Diagnostic Labels Amongst Psychiatrists in the British Isles" (1971) 118 Brit.Jrn.Psychiat.556 4) "The Psychiatrist as Expert Witness: Some Ruminations and Speculations" (1965) 63 Mich.L.R. 1335 at p.1340 5) Law and Psychiatry (1962) at p.34

has a long way to go in discovering the causes and cures of many psychic illnesses." Indeed, it has been cogently argued by Diamond[1], himself an eminent psychiatrist, that psychiatry, both as a body of scientific knowledge and as a profession, has failed to fulfil the needs of the law. Psychiatry has failed, says Diamond, particularly in the areas of diagnosis and treatment: effective diagnosis, for example, of schizophrenia is impossible because it is not certain whether the condition known as schizophrenia is a disease, a variety of diseases or not a disease at all. "There is as yet" he goes on to say,[2] "no thoroughly reliable treatment method which can be applied to the mentally ill offender and which can ensure both his rehabilitation and the safety of society." An even more extreme position has been taken up by the iconoclastic psychiatrist Szasz, whose central thesis is that most mental illness cannot correctly be described as disease in the true medical sense, but rather as maladaption which frequently reflects deficiences in moral responsibility or character. Therefore, Szasz argues,[3] psychiatry is totally irrelevant to questions of law and that, hence, psychiatrists should withdraw completly from the administration of the criminal law, which should abandon any recognition of mental disorder as being relevant to the determination of responsibility or sentencing. Similarly, other psychiatrists like Schemideberg, have themselves sometimes declared, in writing of their own value in courtrooms, that too much significance is given to their pronouncements[4]. And certainly where

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1) "From Durham to Brawner, A futile Journey" (1973) Washington Univ. L.R. P.109 2) "From Durham to Brawner, A futile Journey" (1973) Washington Univ. L.R. at p.117 3) Law, Liberty and Psychiatry (1963) at P.216. 4) Schmideberg "When the Psychiatric Diagnostic Interview Is A Farce" (1973) 17 Int. Jrn. Offender Therapy and Comp. Criminal. 211

female psyche is being testified to, it can be contended that the trials of court and psychiatrist are increased: thus Sigmund Freud, who would be regarded by many as the leader and pioneer in the psycho-analytical field, acknowledge his lack of expertise in this area. Freud[1] said: "If you want to know more about feminity, enquire from your own experience of life, or turn to the poets, or wait until science can give you deeper and more coherent information."

At this juncture I would like to refer to the important issue of the psychiatric evidence of character of witnesses. As seen in the previous discussion of the issue, psychiatric evidence of character presents a number of interesting and fairly difficult questions. However, it is clear that such evidence is usually admissible to show that a witness suffers from some mental or physical condition which affects the reliability of his evidence[2].

The pertinent question here and now is that, in view of the considerations already enumerated, does it then, mean that psychiatric evidence ought not to be utilised by the courts? The first point to be made is that, whatever the true deficiencies of the psychological sciences, it has become common-place today that the processes of the law and legal reasoning are by no means as dispassionate, objective and precise as was once supposed. As Frank has described it[3] in a well-known passage, "First, the trial Judge in a non-jury or the jury in a jury trial must learn about the facts from the witnesses; and witnesses, being humanly fallible, frequently make mistakes in observation of what they saw and heard, or in their

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1) Femininity (1932) at P.22 2) See Toohey v Metropolitian Police Commissioner (1965) 49 Cr.App.R. 148; R v Lupien (1970) 9 D.L.R.(3d)1 See also Walker and Walker - Law of Evidence in Scotland- §350
3) Law and the Modern Mind (English Ed. 1949) at P.X; for a Commentary see Roebuck "Modern Society and Primitive Law" (1970) 3 U.Tas.L.R. 258

re-collections of what they observed, or in their courtroom reports of those recollections. Second, the trial Judges or Jurors, also human, may have prejudices - often unconscious, unknown even to them selves - for or against some of the witnesses, or the parties to the suit, or the lawyers." Perhaps, therefore, criticisms of the psychological sciences coming from the often isolated lawyer are not worth a great deal. And I would like to recall again here the opinion of Wigmore[1], an acclaimed and accomplished legal scholar, who suggested that in all rape cases psychiatric testimony relating to the state of mind of the victim should be admitted.

It is thought that the alleged lack of exactitude characteristic of the behavioural sciences can easily be over-emphasised. Diamond and Louisell contend[2], correctly in my view, that the value of psychiatric evidence cannot be determined by the exactness or infallibility of the evidence given, but rather by the probability that what the psychiatrist has to say, " .... offers more information and better comprehension of the human behaviour which the law wishes to understand."

Finally, I would recommend that the question of the admissibility of, and weight to be given to, psychiatric evidence must be determined on a broad basis, including matters relating to the nature of the criminal trial itself. As Silverman has rightly pointed out,[3] we should cease to think of the criminal trial as some kind of sporting event and rather as a method of determining truth. To that

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1) Evidence, (3rd ed.) §924a at 737 2) "The Psychiatrist as Expert Witness:Some Rumination and Speculations" (1965) 63 Mich. L.R. 1335 at 1342; 3) "Psychiatric Evidence In Criminal Law (1971-2) 14 Crim. L.Q. 145 at 170

end, psychiatric evidence must be admitted where matters which are its province are in issue. Further, in order to assist the court in assessing the weight to be given to it, it is desirable that all the information gathered by the expert witness should be placed at the disposal of the court. In the words of Diamond and Louisell[1]: "(I)n all instances the psychiatric expert (should) be allowed to relate to the court exactly how he reached his opinion and what were sources of his information. He should be required to describe in fairly precise terms his own process of revealing his source material: what information did he accept, and what did he reject; what sources did he place great weight upon, and what sources did he minimise; and why did he evaluate the clinical material in these ways". It is essential if such chaotic and unjust situations that sometimes occur are to be avoided, that a coherent, scientifically based policy be devised regarding psychiatric evidence, for the simple reason as Father Philip Berrigan has said,[2] that, " .... so long as it sacrifices justice, law will never be an instrument of order." There can be no doubt that order is a commodity which has been sadly lacking to date.

In view of the considerations, I am of the opinion that it would be desirable to promote comprehensive psychological research on the correlation between character, trait, habit, custom, and similar facts. This should lead to safe conclusions as to the probability of committing an additional similar act. I would suggest that research groups be set up in the main areas of human activity, every group

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1) See Infra, (1965) 63 Mich.L.R. at 1354 2) Prison Journals of a Priest Revolutionary (1971) at P.115

being headed by a jurist and composed of behavioural and social scientists (Sociologists, psychologists, psychiatrists, statisticians, etc), and of representatives of scientific disciplines and professions related to the area under research. The groups would submit their reports with their recommendations, to an organisation for the law reform, which would also comprise scientists.

Similar fact evidence has never before in the United Kingdom been generally governed by statute, and it is in this light that it will be interesting to consider here the recommended statutory formulation by the Criminal Law Revision Committee[1] as embodied in Clause 3 of the draft Bill annexed to its Eleventh Report. These provisions purport to state the existing Common Law, subject to an important modification in sub-clause 3(4), and subject to the Committee's hope[2] that the statutory formulation of the existing rules will be less strictly construed in favour of the accused.

Clause 3 (1) states: "Subject to the provisions of this section, in any (criminal) proceedings evidence of other conduct of the accused shall not be admissible for the purpose of proving the commission by him of the offence charged by reason only that the conduct in question tends to show in him a disposition to commit the kind of offence with which he is charged or a general disposition to commit crimes."

In this section "other conduct of the accused" means conduct of the accused other than the conduct in respect of which he is charged. It should be noted that evidence of conduct showing only a general

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1) See 11th Report, Paras. 70-101, cf Thomson Committee Report - Chap 54 2) Para 100

disposition to crime is wholly inadmissible since it is excluded by sub-clause 3 (1) and as we shall see, is not made admissible by either sub-clause 3 (2) or sub-clause 3 (4).

Clause 3(2) states: "In any (criminal) proceedings evidence of other conduct of the accused tending to show him in a disposition to commit the kind of offence with which he is charged shall be admissible for the said purpose if the disposition which that conduct tends to show is, in the circumstances of the case, of particular relevance to a matter in issue in the proceedings, as in appropriate circumstances would be, for example - (a) a disposition to commit that kind of offence in a particular manner or according to a particular mode of operation resembling the manner or mode of operation alleged as regards the offence charged; or (b) a disposition to commit that kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged; or (c) a disposition to commit that kind of offence (even though not falling within paragraph (a) or (b) above) which tends to confirm the correctness of an identification of the accused by a witness for the prosecution."

It is worthwhile to refer to a pertinent American provision as provided by Rule 404 (b) of the American Federal Rules with a view to contrasting the provisions. Rule 404 (b) reads as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such

as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

It is the view of Cross[1] "that the subclauses of the draft Bill set out above are to be preferred firstly because s.404(b) makes no allowance for cases, such as R v Straffen[2] in which evidence of other crimes is admissible to prove the character of a person in order to show that he acted in conformity therewith; secondly, because the use of the ambiguous word 'identity' in the enumeration of the other purpose for which character evidence is admissible is tantamount, at any rate where the evidence of the actus reus is cicumstantial as it was in Straffen's case, to saying that 'evidence of character may be admissible when it goes to show that the accused was guilty of the crime charged.'"

As evident from the provisions above, the examples of circumstances rendering the evidence of particular relevance in sub-clause 3(2) are those where it shows a disposition to commit the offence in a particular way, or against a particular person, or where it tends to confirm identification. C.F. Tapper[3] observes that it is perhaps upon the first of these that the Committee hopes that a less strict interpretation will be placed, and he says that a clue to its attitude may be gathered from the committee's discussion of the case of R v Morris[4], where it accepts a description of the circumstances of two attempted abductions as "strikingly similar" - (infact the Court of Appeal said that there was a "startling resemblance") although in

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1) Cross On Evidence, 5th ed. at p.401 2) (1952) 2 Q.B. 911; (1952) 2 All E.R. 657 3) "Criminal Law Revision Committee 11th Report", 36 M.L.R. 56 at 58 4) (1964) 54 Cr. App. R. 69

one a girl peacefully accepted an invitation from the driver of a car to show him the way, whereas in the other an attempt was made to drag another girl into a different car after she had been lured to it by an offer to show some fireworks. As Tapper rightly criticised[1], this seems questionable, and as he pointed out, it should not be overlooked that similarity of technique is not in itself sufficent to show a disposition in the accused to commit the offence in that way, unless the respect in which similarity is shown is itself unusual. It would clearly be insufficient in order to show a disposition to rob banks, that bank notes were taken on each occasion. Similarly it seems hardly enough in R v Morris[2] that attempts were made on both occasions to get girls into a car.

However, Tapper[3] did make some fairly controversial criticisms of clause 3(2). For example he complained that the wording of clause 3(2)(b) does not cater for R v Ball[4], because it speaks of a "disposition to commit the kind of offence in respect of the person in respect of whom he is alleged to have committed the offence charged", and the other conduct proved against the Balls was intercourse at a time when incest was not an offence. To that criticism Cross retorted:[5] "I would have thought that the ... complaint is answered by the fact that a disposition to have legally innocent intercourse becomes a disposition to commit an offence when that intercourse is prohibited, even though the prohibition might reduce the probability of action in accordance with the disposition."

Another criticism by Tapper[6] is that clause 3 (2) (c) is explicitly

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1) See Infra 2) (1969) 54 Cr. App. R. 69 3) 36 M.L.R. pp 58-59 4) (1911) A.C. 47 5)"Clause 3 of the Draft Criminal Evidence Bill, Research and Codification" (1973) Crim. L. R. 400 at 405 6) 36 M.L.R. 58-59

limited to cases where the disposition "tends to confirm the correctness of an identification of the accused by a witness for the prosecution", and according to him, this is a most important qualification of the provision. Tapper argues that "(i)t would thus not apparently apply where the accused was identified by a child too young to give evidence for the prosecution, or by a witness who subsequently disappears or refuses to give evidence, or by a victim who dies after making the identification but before the trial". He goes on to say that: "It might be argued that the sub-clause is exemplary only, and that as the Committee itself recognises the undesirability of attempting to compile a fixed list[1], these cases could be catered for by analogy. The difficulty with this approach is that it ascribes no significance at all to the -(words 'by witness for the prosecution') - which become otiose." And in answer to this complaint Cross says[2] "that clause 3 (2) (c) was drafted with Thompson v R[3] in mind. The identification in that case was by a witness for the prosecution and, owing to the appointment Thompson was alleged to have made with the boys, his homosexual disposition was 'in the circumstances of the case, of particular relevance to a matter in issue in the proceedings'."

"It is submitted that these words answer the suggestion of Lord Salmon that clause 3(2) is a 'considerable expansion of the law[4]. He had in mind the case of a burglar who regularly gained access to houses by forcing downstairs windows. The burglar would have shown a

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1) Paras 82, 101 2) (1973) Crim. L.R. at p.405 3) (1918) A.C. 221
4) 388 H.L. Deb. Col. 1609; See also Lord Morris at Col. 1632

disposition to commit the kind of offence in a particular manner within clause 3 (2) (a), but the circumstances of the case would have to be most peculiar for this to be of particular relevance."

We can now look at clause 3 (3) which reads as follows: "Where in any (criminal) proceedings evidence of any other conduct of the accused is admissible by virtue of subsection (2) above for the purpose of proving the commission by him of the offence charged, and the accused has in respect of that other conduct been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere, then, if evidence tending to establish the conduct in question is given by virtue of that sub-section, evidence that he has been so convicted in respect of it shall be admissible for that purpose in addition to the evidence given by virtue of that sub-section."

It is thought that, as there are very few reported cases in which similar fact evidence has been received where the accused had already been convicted of the offence proved by that evidence, this provision is of no great practical importance.

Clause 3 (4) deals with the situation where the conduct is admitted; the proposals here are said to be "highly contraversial". It reads as follows: "In any (criminal) proceedings where the conduct in respect of which the accused is charged is admitted in the course of those proceedings by or on behalf of the accused, evidence of other conduct of the accused tending to show in him a disposition to commit the kind of offence with which he is charged shall be

admissible for any of the following purposes namely - (a) to establish the existence in the accused of any state of mind (including recklessness) proof of which lies on the prosecution; or

(b) to prove that the conduct in respect of which the accused is charged was not accidental or involuntary; or

(c) to prove that there was no lawful justification or excuse for the conduct in respect of which the accused is charged,

notwithstanding that the other conduct is relevant for that purpose by reason only that it tends to show in the accused a disposition to commit the kind of offence with whom he is charged:

provided that no evidence shall be admissible by virtue of this subsection for the purpose of proving negligence on the part of the accused."

The innovation of clause 3 (4) is that if the accused admits the conduct with which he is charged, then evidence tending to show disposition alone is admissible for the listed purposes even in the absence if any special circumstances making it of particular relevance. Here the three listed purposes are not exemplary but definitive, though it is recognised[1] that there may be some internal overlapping.

As Professor Rupert Cross pointed out,[2] "the basis of the reception of evidence of disposition is that there comes a time when, assuming that the evidence is true, the hypothesis of the accused's innocence of the offence charged places a very great strain on the credulity of

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1) At p.215 in the Commentary on Clause 3 2) (1973) Crim. L.R. at p.401

the tribunal of fact. That tribunal may of course not be satisfied beyond reasonable doubt of the truth of the evidence of disposition, or of the other evidence in the case connecting the accused with the offence charged or it may simply be prepared to be credulous. In any of these events the accused must be acquitted, but it would be unreal not to allow the prosecution to adduce the evidence of disposition. The principle of law is that the strain on credulity must be very considerable before the evidence of disposition becomes admissible. In general, the disposition proved by the other conduct must be a dispostion to act in a highly specific way resembling that in which the offence charged is alleged to have been committed in every significant respect, and even the most wholehearted admirer of the status quo might be disposed to question the good sense of some of the decisions". It is thought that the principle underlying clause 3 (4) is that the point at which credulity is strained to such an extent as to render it unreal to reject the evidence of disposition is reached sooner when the conduct alleged to constitute the crime charged is admitted by the accused than when it is denied[1]. Without doubt, it would be too risky to rely on the arguement "he is the kind of man who would do that kind of thing" to establish such conduct; but no greater risk than that attendant upon the reception of evidence of his past beliefs and earlier declarations of intention as evidence of the accused's state of mind at the time of the alleged offence is involved in the acceptance of the argument from disposition when the intention of the accused, or the existence of a lawful excuse, is all

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1) Ibid

that is in issue.

There is liable to be a greater strain on credulity where the actus reus is admitted than where this is not the case. For example, if on the facts such as those of R v. Fisher[1], the making of the false pretences charged is denied, it may well be right to insist on a very high degree of relevance and hence of similarity in the case of the other false pretences, but, where the false pretences are admitted, it does seem rather absurd to exclude other dissimilar fasle pretences on the issue of intent to defraud. A further appreciation of this point can be seen from the following illustration[2]. For example, A swears that he saw B furtively approach a car standing outside a house, take a handbag from the car and a latchkey from the bag, and then open the door of the house with the key. B is charged with burglary and his defence is mistaken identification. The hypothesis of B's innocence would place some strain on the credulity of the tribunal of fact if it were told that B had been guilty of breaking into shops and offices by climbing through the windows with intent to steal, but the risk of its jumping to the conclusion that B was the man observed by A because he is the kind of man who would commit burglary is thought to be too great to render his previous conduct admissible. However, assuming that B admits that he was the man observed by A, but contends that he entered the house while having a black-out, or in order to "have a bit of kip in the warmth"; it would be unreal to exclude the evidence of the other break-ins because the

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1) (1910) 1 K.B. 149 2) (1973) Crim. L.R. P.402

strain on the credulity of the tribunal of fact caused by the hypothesis of B's innocence would be so much greater. A shopbreaker who enters other people's houses as a trespasser without dishonest intent must be a very rare bird, more than the shopbreaker who is mistakenly identified as a burglar entering a house with intent to steal. In the opinion of Cross, from the theoretical point of view there is much to be said for the proposals of clause 3 (4). He remarked that: "In spite of the undoubted theoretical merits of these recommendations, it must be admitted that they bear a somewhat academic appearance, that the admission of the accused's previous convictions is probably repulsive to English public opinion, that it might not always be easy to ascertain in practice when the actus reus was admitted, and the question of what constitutes the same kind of offence as the offence charged could give rise to difficulty."[1]

There are some other meaningful criticisms of clause 3 (4) that is worth considering. According to Tapper[2], this formulation should prevent abuse by reference to an alleged confession which is denied at the trial. And he thinks that an immediate and obvious reaction to this provision is that in future the accussed with a record will be well advised to admit nothing. He goes on to point out that "(t)he Committee anticipates this objection, but it is rejected by the majority because it is of the opinion that where the accused's real defence is that the conduct took place but was innocent, he will not, for tactical reasons, be in a position to deny the conduct.[3] In other words, it is not plausible to argue, 'I didn't do it at all;

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1) Cross On Evidence, 5th Ed. at P.403 2) 36 M.L.R. at P.60
3) Para. 94

but if I did it, I did it with an innocent intent, or by accident, or because I was entitled to do it'." It is argued that though this may be true it is not decisive. And to buttress that stand the following argument is put forward[1]: "In the first place, it assumes that the accused with a record will run his real defence, at least in the alternative. This might be thought to be supported by McCabe's finding that 63 per cent of defendants do not deny their involvement in the incident in respect of which they are charged.[2] But those findings relate to cases decided under the present rules. It is instructive to compare them with the American findings that independent eyewitness evidence was adduced by the prosecution in only 25 per cent of their cases[3]. This suggests that it might well be possible for many more accused persons to deny their involvement if it became advantageous for them to do so. A second objection to this provision is that it is completely inconsistent with the Committee's reason for abandoning the current rule relating to the consequences of making imputation upon the prosecution witnesses in cross-examination, where the imputations is a necessary part of the defence, namely[4]: 'It is wrong that the admissibilty of evidence, in so important a matter as this, should depend on the tactics of the defence. The legal advisers of the accused are in the invidious situation of having to choose between leaving the jury or magistrates' court in ignorance of the facts behind the evidence given by prosecution witnesses (facts that may greatly impair that evidence)

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1) 36 M.L.R. at P.61 2) McCabe and Purves, "The Jury at Work", Oxford University Penal Research Unit Occasional Paper NQ4 (1972), P.4, Table 5 3) Kalven and Zeisel, "The American Jury" (1966), P.131 Table 31 4) Para 123 (V)

and allowing the prosecution to introduce prejudicial evidence of the accused's convictions. Whether the accused is convicted or not may depend on the way in which this choice is made, but it is not one that legal advisers should be called on to make. A rule that operates in this way turns the Criminal trial into a kind of game.'"

C. F. Tapper argues further that the situation that Clause 3 (4) creates, makes the accused with a long and prejudicial record, even of dissimilar offences, who happens to be innocent, to be faced with a choice between running his real defence of innocent involvement in the hope that the jury will not be influenced against him on account of his record and fabricating a false defence denying involvement in order to avoid any possible prejudice on account of the revelation of his record. "If it is wrong to confront the accused with this dilemma in relation to his tactics in cross-examination, it is hard to understand why it is right in relation to his choice of defence."[1] Another criticism is that clause 3 (4) is unsatisfactory in form; it requires "the conduct in respect of which the accused is charged" to be admitted. It is thought that this may prove a difficult phrase to construe. "Both in the body of the Report[2] and in the notes[3] it is equated with an admission of the actus reus. This is very surprising, since a defence that an act was accidental or involuntary, or that it was done with at least some lawful justifications or excuses, is generally regarded as a denial of an actus reus[4]. It is vital to grasp just what it is that the accused must admit before his record can be used against him. Despite the reference to actus reus by way

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1) 36 M.L.R. at P.61 2) Paras. 92, 94 and 95 3) At P.215 in the Commentary on Clause 3 4) See Williams, Criminal Law: The General Part (1961) pp. 12 and 20

of explanation it seems that 'conduct' does not necessarily include any mental element since accident and voluntariness figure among the purposes which may be proved by evidence of the accused's record. It may be noted, however, that in many cases where the defence is that the act was involuntary,[1] the accused will not be in a position to admit the conduct since his claim is that he did not know what he was doing. To cater for such cases it would be necessary to bring the provision into operation not only when the conduct was admitted, but also when it was not denied."

Whatever the merits or demerits of the criticisms against the formulation of claue 3 (4) it seems clear that it is unlikely that the suggested changes it hopes to make to the law will prove to be acceptable. And it is interesting to note that one of the aims of the Committee was to reduce "the gap between the amount of relevant evidence which could be given and the amount which is in fact given"; but it is thought that the provision of clause 3 (4) not only fails to further that aim, but positively detracts from it, and so should in principle form no part of the reformed modern law of evidence.

Clause 3 (5) provides, for the reception, in a clause 3 (4) case, of the conviction of the kind of offence with which the accused is charged, whether or not any further evidence of the other conduct is given. The pertinent question here is whether the adoption of clause 3 (5) would appreciably increase the risk of convicting the innocent. And to that question Cross says that[2] "(i)t is hard to believe that

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1) e.g. R v Mortimer (1936) 25 Cr. App. R. 150 2) (1973) Crim.L.R. at P.402

the subclause would have the dreaded effect in cases in which further evidence of the other conduct is given, just as it is hard to believe, that the proof of previous convictions under clause 3 (3) would have this effect in cases in which the other conduct is proved under clause 3 (2) because it is of particular relevance."

Cross then asks about the case in which a bare conviction is proved under clause 3 (5). And in answer to that he draws attention to an illustration given by Lord Stow Hill[1]. "A., who has previous convictions for theft, goes to a football match where he sits beside B who leaves his wallet on the seat. A. takes the wallet up and walks away with it intending to hand it into the police station but, before he gets that far, he is arrested and charged with theft of the wallet. If it appears at the trial that A handed the wallet over without further ado when questioned by the police, and stated that it had always been his intention to do so, it is difficult to believe that he would not be acquitted, notwithstanding the proof of his previous convictions which might in fact arouse the sympathy of the jury for a thief turned honest and nonetheless badgered by the police. It is of course possible to ring the changes on what might occur at the trial; but A's chances of an acquittal would surely, other things being equal, always be as good as, if not better than, those of a white man who advances a true plea of self defence to a charge of assaulting a coloured man but has shown that he is the kind of man who would commit the kind of assault without justification by repeated encomia of racist violence."

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1) 388 H.L. Deb. col. 1662

Cross confesses to "have been indulging in guesswork about the reactions of jurors to proof of previous convictions, just as those who object to clause 3 (5) on the ground that it would appreciably increase the risk of convicting an innocent man are indulging in guesswork."[1]

Tapper expressed surprise[2] at the fact that the Committee made the recommendations embodied in clause 3 without referring to such empirial evidence as is available He said: "Had they done so they would have found some support for the hypothesis that disclosure of the accused's previous record contributes significantly to his chance of conviction". And to that criticism Cross asks[3]: "But would they have been any wiser with regard to the crucial question whether the disclosure of the record increases the risk of the conviction of an innocent man?" He however acknowleged that it is a sad truth, known to everyone, that a person's chance of being reconvicted for an offence increases with each conviction of that offence, and the natural assumption is that this is because he committed each of the offences for which he has been convicted. Cross points out[4] that it is highly significant that in the case of one of the studies mentioned by the critics[5] there is no indication that the record was disclosed to the "jurors" who convicted 81 per cent of the defendants in the sample with previous convictions, just as it is most reassuring to learn from Professor Cornish[6] that his "jurors" tended to discount the effect of dissimilar convictions and to take account of

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1) (1973) Crim. L.R. 403 2) 36 M.L.R., 56 3) (1973) Crim.L.R. 403 4) Ibid 5) McCabeand Purves, The Jury at Work 6) Unpublished Research

a judicial direction to disregard similar convictions. "But what has all this to do with the merits of clause 3 (5)?" In the view of Cross the truth of the matter is that the critics have completely failed to appreciate the enormous difficulties which research into the effects of the rules of evidence must encounter, and then to them he recommends the words of Professor Cornish: "Over a matter as complex as the functions of juries, it will be long before we can base reform upon anything firmer than the impressions of these who work in and observe the trial process; and discussions about reform cannot be defered indefinitely."[1]

The existing law with regard to character evidence also deserves some evaluation with an aim to making suggestions for reforms.

Occasionally, the character of a person is a material issue in the case, an operative fact which dictates the rights and liabilities. Examples of such cases when character is a defence or justification, an element of the crime charged or cause of action alleged, or in which it is relevant to the appropraite punishment or measure of damages are: cases involving the lack of fitness or incompetency of an employee, actions for defamation in which justification is pleaded; cases in which reputation is material with respect to the measure of damages. When character is directly relevant to a fact in issue and not just circumstantial evidence from which conduct might be inferred, or when the substantive law makes character the very core of the inquiry, evidence of it must be admitted. It is therefore hoped that any proposed legislation would begin with a

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1) Ibid

broad rule of admissibility and liberal stance respecting the manner of proof. Furthermore, I would recommend as part of any such broad rule that the trial judge should have the power to exercise a discretion to exclude in particular case when the probative value of the type of evidence sought to be used is outweighed by any of the dangers generally anticipated. That is, evidence relevant to the character of any person should be excluded, if, in the opinion of the judge or other person presiding at the trial or other proceeding its probative value is substantially less than the likelihood of: creating unfair prejudice to any party in the proceeding, or confusing the issue to be decided, or misleading the jury or other person or persons whose duty it is to determine the facts; or unduly delaying the proceeding. Such judicial discretion should be part of any proposed provision with regards to general rules respecting character. It goes without saying however that the dispensation of discretion has its drawbacks, as it is not subject to review and could become an arbitrary thing, but since Judges are generally men of trained minds and have in many instance had to exercise their discretion, I have no doubt that it would pose no difficulty in this case.

In civil cases, the law at present is that character evidence cannot be used as circumstantial evidence in a civil case to prove the conduct of the parties. It is evidently agreed that character evidence is of such slight probative value that it ought to be excluded in civil cases especially when weighed against the

possibility of prejudice, consumption of time, distraction from the main issue and the hazard of surprise. In those civil cases, however, when a party is charged with criminal, immoral or fraudulent conduct, for example in actions for assualt or seduction, or in actions for intentional conversion or for fraud or deceit, the defendant may have his reputation and property at stake as much as in a criminal case involving the same matter. The imputations and even sanctions may be the same. I would recommend that any future legislation should give the trial judge a discretion to admit such evidence in civil cases and allow him to balance on the facts of each individual case, the probative worth against the dangers enumerated above. It is also recommended that such legislation prescribes that the same rules with respect to character evidence in criminal cases be applicable to civil actions which involve an allegation of moral turpitude.

Another aspect of the character evidence I would like to attend to is the controversy over the Common law rule that the prosecution is not allowed to open his evidence of the accused's bad character, but the accused may adduce evidence of his good character or elicit it in cross-examination, and the prosecution may adduce or elicit evidence of bad character in rebuttal. It has been suggested that the Common law rule should be altered so as to allow the prosecution to open with evidence of the accused's bad character, or at least proof of his previous convictions, or that the accused's previous convictions should be made known to the jury by the Judge. Suggestions of this

nature derive much of their force from the commonly held view that the modern jury knows that, when an accused does not give evidence of good character, he has a bad one, and their speculations may be more prejudicial to the accused than knowledge of the truth. There is no means of verifying that view however, and one therefore prefers to act on the assumption underlying this branch of the law of evidence, namely, that, although the accused's bad character is relevant to his guilt, its disclosure, when the issue is not raised by the accused, would be too prejudicial to an accused with a record. And it should be made clear that existing rules forbidding the prosecution to adduce evidence of the accused's bad character as part of its presentation in chief, are based not on any concern for relevance but rather on the fact that the danger of unfair prejudice to the accused outweighs the probative value. A trier of fact might convict merely because the defendant is seen to be a person capable of committing a crime or because he is viewed as a bad man deserving of punishment. Also, the trier of fact, having heard evidence of the bad character of the accused, might be less critical in assessing the evidence of the accused's guilt of the specific offence charged, perhaps feeling that the consequences of a mistake would not be too serious. Therefore, to ensure a rational decision on the merits of each particular case, and to ensure that any person regardless of his past can receive a fair hearing, one is bound to signify backing for the continuation of the existing rule that forbids character evidence that is

tendered solely as circumstantial evidence to prove conduct.

However, the rationale underlying the rule that forbids the prosecution to initiate evidence of the accused's character, that such evidence might unfairly prejudice the accused, obviously does not apply when the accused himself seeks to introduce evidence of a trait of his character that would render it unlikely that he committed the crime. Having questioned the probative worth of character evidence and the techniques of its proof I am persuaded that an accused in a criminal trial, with his liberty at stake, is entitled to the special dispensation from the general rule that the common law has bestowed. No matter how indefinite character evidence may be as a basis for the prediction of conduct, it may, in some cases, be enough to raise in the mind of a reasonable person a reasonable doubt on accused's guilt. I would however recommend an exception, which makes it clear that the accused is not entitled to prove his good character at large but may prove only a trait of his character which is relevant to the crime charged; the reason for such a confinement is to save the court's time and minimise distraction of issues. Furthermore it is the reasonable course to take from the point of view of probativeness. If the accused leads evidence of a trait of his character to prove that he did not commit the crime charged, under the existing law the prosecution is entitled to respond with contrary evidence of the defendant's character. This right should be part of any proposed legislation. This will prevent the accused from misleading the trier of fact by presenting a mere

parade of partisans, or by giving false testimony as to his own good character. However I would also recommend here a change to the existing law by limiting the prosecution's character evidence to evidence of a trait which is relevant to the crime charged, though not necessarily the trait with respect to which the defendant has chosen to lead character evidence. This recommendation is obviously good for the court in terms of expediency.

Note X in Stephen's Digest of the Law of Evidence[1], expresses doubts about the statement Archbold[2], adapted in R v Redd[3], according to which the accused's previous convictions may be proved in rebuttal of evidence of good character.

It is my view that previous convictions should be admissible in rebuttal; but it is essential to get rid of the effect of the decision in R v Winfield[4], according to which the accused's character is indivisible with the result that a witness called to speak to the chastity of someone charged with an indecent assualt upon a woman may be questioned about the accused's previous convictions for larceny. In my opinion such a reasoning is contrary to common sense and most unfair to the accused. In most cases such evidence lack any probative value and worse still it carries with it a high risk of prejudice.

There is sufficient authority that at common law the defence must confine itself to evidence of good character relevant to the offence charged. Lord Cockburn C. J. in R v Rowton[5], says that the the

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1) 12th edition 2) 40th ed. Para. 558 3) (1923) I K.B. 104
4) (1939) 27 Cr. App. R. 139 5) 11 L.T. 745, 747

prosecution in rebuttal should be similarly confined. He is really dealing with the rule that character evidence must be limited to general reputation, but the same considerations operate here, in fact in Slate v Bloom[1], Warden J., gives the need to limit the prosecution to the specific trial as the reason for the rule forbidding the defence to go beyond it. It must be remembered though that the decision of R v Winfield is only a dictum, as Winfield's conviction was quashed on another ground. The case unfortunately escaped a contemporary note in the journals and has passed without comment into the textbooks[2], except for a recent criticism by Nokes; he observes[3]: "If a man is charged with forgery, cross-exmination as to his convictions for cruelty can have no purpose, but prejudice". This criticism, without doubt, goes to the root of the matter; prejudice is the ground of exclusion. Old rules for the exclusion of particular facts from character evidence rest mainly on absence and confusion of issues, but these considerations do not apply in the case of previous convictions[4]. In determining whether a previous conviction relates to a relevant trait, the application of the rules should not be too finical, and it is thought that some United States authorities err in this respect. For instance, in Comm. v Colandro[5], on a charge of murder, it was remarked that questions about a previous kidnapping would have been excluded if objected to, and in People v Haydon[6], also a case of murder, evidence as to robbery was held to be inadmissible[7]. It is submitted that evidence as to these previous crimes should have been admissible to rebut the evidence of good character

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1) 68 Ind. 54, 57 2) Stone, 58 L.Q.R. at 372, treats it as a case under the Act of 1898; also Simon L.C. in (1944) A.C. at p.329 3) Introduction to Evidence at p.113 4) Wigmore, Evidence, Vol III, 538, §980 5) (1911) 80 Atl 571, 575. Supreme Court of Pennsylvania 6) 123 Pac. 1102, 1112 - District Court of Appeals, California 7) 123 Pac. 1102, 1112

that had been offered, as in each case a crime of violence was in question. On the other hand, the court should not be too astute to admit such evidence. I agree with the submission that a golden mean can without difficulty be found if the aim of the court is to exclude evidence which is merely prejudicial, and it is submitted that the evidence of previous convictions admitted in R v Winfield was certainly prejudicial to a fair trial. And it should be pointed out that if the above suggestion is to be adopted in Canada, Section 593 of the Canadian Criminal Code, which permits proof of any criminal convictions should the defendant adduce evidence of good character, would need to be repealed.

McCormick has said[1]: "One who has read the description of the present practice of impeachment and support, will have marvelled at the archaic and seemingly arbitrary character of many of the rules. He will also have observed with regret the laggard pace of the law in taking advantage of the techniques and knowledge which are afforded by modern science of psychology in appraising the (problems). Two principal retarding influences are apparent, namely an undue distrust by the judges of the capacity of jurors, and an over-emphasis upon the adversary or contentious aspect of our trial tradition."

That statement is probably more true in respect to the character of third parties or the victims, than any other part of character evidence.

By the present law, the character of the victim, good or bad, is

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1) McCormick Evidence, §50

generally not receivable as circumstantial evidence of the victim's conduct on the occasion in question. The only exception exists in cases involving sex offences. For example, in a rape case the victim's reputation as a prostitute may be received as evidence tending to establish that she had consented to the intercourse complained of and character evidence in rebuttal is similarly admissible. Indeed, in some cases the woman's reputation, not her consent, becomes the central issue. Besides questioning the probative worth and the prejudicial effect of such evidence, one is deeply concerned with the effects of existing abuses of this type of evidence. Since the complainant may suffer unfair embarrasment and great harm, rape victims are often reluctant to press charges, and also women of bad character are provided with little protection against rape. In cases involving sex offences, the accused should not be permitted to adduce evidence of bad character of the victim either in cross-examination or in its case in chief. In my view, the present state of the law is enormously unfair to the rape victim, and many cases go unreported as a result of the intimidating cross-examinations which in many cases are found not only lacking in probative worth but are also highly prejudicial.

However, the above-noted concerns are not considered to be as overpowering in the trial of other crimes. Evidence of the character of the victim should therefore be receivable, when relevant to the crime charged or defence raised, even though such character was unknown to the accused at the time of the incident. For example,

in a prosecution for homicide or assualt, the victim's character with respect to violence may be of considerable probative value to show that he was the aggressor. Safeguards surrounding the accused's decision to lead this type of evidence should be provided by allowing the prosecutor both to rebut the evidence so led and to lead evidence exhibiting a relevant trait of the accused's character; the latter ability is deemed necessary lest the trier of fact be misled, and prejudiced; for example, in determining who was more likely to have been the aggressor in an altercation, the trier of fact should be able to take into account character for violence of both the accused and the victim - the probative worth of such evidence is undeniable. Furthermore I would like to recommend here that the prosecution should always be allowed to lead relevant evidence of the victim's good character even though the defendant has not directly adduced evidence of the victim's bad character. For example, in a case of homicide in which the accused alleges self-defence but does not lead evidence of the victim's propensity for aggressiveness, the prosecution would nevertheless be permitted to lead evidence of the victim's character for peaceableness. The danger in this suggestion of course resides in possible prejudice to an accused, for the trier of fact may be unduly influenced by the attractiveness of the victim and decide the case emotionally out of feelings of pity or vengenance. It is however, best to leave the decision to exclude this evidence to the discretion of the trial judge who would weigh the probative value

against the possibility of undue prejudice in the particular case.

I would now turn my attention to the provisions of the Criminal Evidence Act 1898; there have been a lot of diatribes with regard to Section 1 (f) of the Act[1], and one can confidently say that the subsection as construed by the Court is too favourable to the accused at some points and too unfavourable to him at other points. Since a thorough study of the provisions of Section 1 (f) had already been made earlier in the thesis, I intend to consider only those aspects of the Act that are due for reform. And it is interesting to note in this respect with regard to the cross-examination of the accused under the Act, that the Criminal Law Revision Committee has made some recommendations which border on a compromise. The relevant provisions are set out in clauses 6, 7 and 15 of the draft Bill annexed to the Eleventh (11th) Report. The word "character" is abandoned in favour of "reputation", "disposition" and, where appropriate "credibility".

One general point should be made before referring to the case law with which the majority of the recommendations are primarily concerned. A provision similar to Section 1 (e) of the Criminal Evidence Act of 1898 is recommended by the Criminal Law Revision Committee when dealing with the privilege against self-incrimination; under the recommendation, the accused cannot refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove him guilty of the offence charged, but it proceeded to recommend a provision to which there is no

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1) See S.159 (d) of the Nigeria Evidence Act; S1(f) of the 1924 Criminal (Justice) Evidence Act - Ireland; SS.141(f) and 346 (f) of the Criminal Procedure (Scotland) Act, 1975

counterpart in the of Act 1898. The proposal is that the accused cannot refuse to answer a question relevant to an issue on the ground that it would criminate him or his spouse as to other offences, although he may refuse to answer questions on this ground if they only go to his credibility. To take two hypothetical cases on which the Committee considers the law to be unclear, A., charged with shoplifting, swears-in-chief that he was not in the shop in question at the material time; he is asked in cross-examination where he was and objects to answering the question because his answer would tend to show that he was shoplifting in another shop. B., charged with theft, casts imputations on a witness for the prosecution and objects to answering a question in cross-examination as to whether he has made false tax returns[1].

With regard to the first case, it is perhaps arguable that the present English law is perfectly clear although surprisingly enough, there seems to be no authority. It could be said that the accused can rely on the privilege because there is nothing in the 1898 Act to deprive him of it and, if it were the case that, by opting to testify, the accused impliedly waives his privilege against self-incrimination, proviso (e) to Section 1 would be unnecessary. However, the preponderance of American authority appears to support the view that there is such an implied waiver, and whether or not it represents the present English law, R. 25 (g) of the United States Uniform Rules of 1953 produces a result similar to that recommended by the Criminal

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1) See 11th Report of the C.L.R.C. §§ 169-72

Law Revision Committee: "(a) defendant in a criminal action who voluntarily testifies in the action upon the merits before the trier of fact does not have the privilege (i.e. the privilege against self incrimination) to refuse to disclose any matter relevant to any issue in the action ..."

Similarly, there is no authority with regard to the second hypothetical situation. So far as the present law is concerned the question would be whether the structure of Section 1 (f) is apt to abrogate the privilege against self-incrimination with regard to offences other than that charged. As questions tending to show that the accused has committed such other offences are permitted, the answer given by the present law might be thought to be a clear affirmative. But there are those who would approve a change in the law on the lines of the above extract from the Uniform Rules of America.

The decision of the Court of Criminal Appeal in R v Cokar[1], shows that, when Section 1 (f) (ii) or Section 1 (f) (iii) is inapplicable, the accused cannot be asked about a previous charge resulting in an acquittal, even though the question is relevant to an issue in the case other than the accused's credit as a witness. I think, this is too favourable to the accused. In that case, the accused's defence at his trial for breaking and entering with intent to steal was that he had entered the house in question for the sake of warmth and in order to have a sleep. In the course of his cross-examination, he denied that he knew it was no offence to enter a house in order to go

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1) (1960) 2 Q.B. 207

to sleep, and the trial judge allowed counsel for the prosecution to put questions concerning a previous charge of breaking and entering which had resulted in an acquittal. It was probable that the accused had learned, in connection with that charge that it is not an offence to enter a house in order to go to sleep. He was convicted, and his conviction was quashed by the Court of Criminal Appeal on the ground that the question concerning the previous charge had been wrongly admitted. Section 1 (f) (ii) and (iii) did not apply to the case because Cokar had neither put his character in issue, nor cast imputations nor given evidence against a co-accused.

I would recommend that such a question should be made admissible under any new proposal as it is of high probative value. For example, if, as in R v Deighton and Thornton[1], a man having successfully set up a defence of not knowing the difference between zircons and diamonds in a previous case, is again indicted for the same false pretence, and attempts to set up the same defence, then questions about his previous acquittal will be admissible.

The effect of the speeches of the majority of the House of Lords in Jones v D.P.P.[2], is that, in cases in which S. 1 (f) (ii) and S. 1 (f) (iii) do not apply, the accused can not be asked questions tending to show that he is of bad character, unless the facts which those questions tend to reveal have already been disclosed in the course of the prosecution's case or the accused's evidence in chief. This will lead to results so manifestly absurd that they cannot have

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1) (1964) Crim. L.R. 208 2) (1962) A.C. 635

been intended by Parliament. For example, an accused who surprised the prosecution by alleging for the first time in his evidence that he was with his wife on a particular occasion cannct be asked in cross-examination whether he was not with his mistress. Similarly, an accused who sets up an alibi for Tuesday by producing a passport which shows that he was in France from Sunday to Friday cannot be asked whether he was in an English prison on Thursday. Without question this is too favourable to the accused: and the effects of the majority view in Jones's case can be obviated by a provision that says that the accused may be cross-examined where such question is relevant to an issue in the case other than the accused general credit as a witness. This proposal accords, with the opinion of the minority of the House of Lords in Jones, and of the High Court of Australia when considering an identical statutory provision in Attwood v R 1 While the opinions to the contrary of the majority of the House of Lords in Jones are technically obiter dicta, one feels that inferior courts would certainly follow them and that the matter must now be dealt with by legislation.

It does appear that three views may be taken with regard to the second part of Section 1 (f) (ii) which deals with imputations on the character of the prosecutor or his witnesses. First, it may very plausibly be argued that the practical effect of the present law is satisfactory. One understands the present law to be that, although the earlier authorities are in conflict, the prosecutor is legally entitled to cross-examine the accused once there has been an imputa-

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1) (1960) Argus L.R. 321

tion, even though that imputation was necessary for the proper development of such a defence as self-defence. But the Court has a discretion to disallow cross-examination under S. 1 (f) (ii) and that discretion will invariably be exercised in favour of the accused when consent is put forward as an answer to rape, and will usually be exercised in favour of the accused when the imputation is a necessary part of the defence[1]. I think that the defect of the present law is its uncertainty. Counsel for an accused may occasionally be restricted in the proper development of such defence as provocation by fear that his client may be held to have thrown his shield away[2]. Although the point is admittedly debatable, it is my opinion that an accused with a record may be unduly inhibited in challenging a confession which has been proved against him, or alleging that evidence has been planted on him.

Also it has been suggested that the second part of S. 1 (f) (ii) should be repealed altogether. To my mind the drawback of this proposal is that it would allow an accused with a bad record too great a liberty in attacking the credit of the prosecution witnesses.

Finally, it may be possible to find a form of words which will only render the accused liable to cross-examination where the attack on the prosecution witnesses is aimed solely at their credit. If this suggestion were adopted, an accused who attacked the prosecution witnesses in furtherance of pleas of self-defence or provocation, or in the course of challenging confession, would not be liable to

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1) R v Cook (1959) 2 Q.B. 340; R v Flynn (1961) 3 All E.R. 58

2) See R v Brown (1960) 44 Cr. App. R. 181 and R v Cunningham (1959) 1 Q.B. 288

cross-examination on his own record. In other words imputations necessary for the proper development of the defence could be made without running the risk of cross-examination on his past misdeeds. I am in favour of such a change in the law and that is the view taken by members of the Criminal Law Revision Committee. If the recommendation were accepted Selvey v D.P.P.[1] would be overruled, and a number of other decisions will suffer the same fate[2]. It should be pointed out that the recommendation by the Criminal Law Revision Committee was a majority one for some of its members favoured the retention of the existing law, while others favoured a provision more adverse to the accused, namely that he should, subject to the discretion of the judge, be liable to cross-examination to credit like any other witness without regard to the nature of his defence, and yet other members of the Committee favoured a provision according to which the accused should only lose his shield if he sets up his good character or gives evidence against the co-accused. As Cross pointed out[3]: "There are precedents for and against every solution of this thorny problem which has so far been proposed. The accused is treated like an ordinary witness in Canada, where the judge must, if he does not exercise his discretion against the cross-examination of the accused on his record, instruct the jury not to regard the cross-examination as relevant to the accused's guilt.[4] The solution proposed by the majority of the Commitee is that of the American Model Code and Uniform Rules, as well as of the Ghana Criminal Procedure Code[5]; while the Isreali Criminal Procedure Law[6] only allows an

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1) (1970) A.C. 304 2) See R v Hudson (1912) @ K.B. 464; R v Clark (1955) 2 Q.B. 469; R v Cook (1959) 2 Q.B. 340 3) Evidence, 5th ed at p.438 4) Colpitts v R (1966) 52 DLR (2d) 416 5) Model Code,r.106 (3) Uniform Rules, r.21, and Ghana Criminal Procedure Code, 1960, S.120 (5) (c) 6) 5725 of 1965, S.146

accused who testifies to be cross-examined about his previous convictions if he gives or adduce evidence of character. The main argument in favour of the present English law is that it prevents an accused who testifies, for example, to the effect that he was recovering stolen property from the prosecutor and not robbing him, from masquerading as a consistently law abiding citizen when he has a number of previous convictions[1], but it may nevertheless inhibit the development of a genuine defence. The proposal of the majority of the Criminal Law Revision Committee would lessen this danger, but it would still make it possible for Crown witnesses with numerous previous convictions to go free from cross-examination on the subject simply on account of the fact, quite irrelevant to their credibility, that the accused also has previous convictions. The Isreali Law thus has much to commend it, but it is doubtful whether any change in the present law going further than the proposal of the majority of the Criminal Law Revision Committee would be acceptable to the bulk of English practitioners."

Having completed the discussion of the main contents, I would like to discuss some particular issues.

I shall start by alluding to the question of "Codification". It is interesting to note that while the United Kingdom Parliament has been instrumental in formulating Evidence Codes for her colonies, she never did have one for the United Kingdom jurisdictions. It is also interesting that countries which never had one before have either now

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1) See, for example, R v Sargvon (1967) 51 Cr. App. R. 394

got one[1] or are in the process of getting one[2], so it is quite likely that there is a strong case for codification afterall. Quite recently the view has been expressed by Professor D.M.Walker[3], that the law of evidence "could, and should be codified, and codified in the continental style by the enactment of general principles, not dealt with in the usual British way by enactment of enormously detailed and verbose provisions." And earlier in Scotland, when the Draft code was proposed, it seemed to the Scottish Law Commission "that for many reasons the law of evidence was the branch not only the most easily susceptible of codification, but was also that in which a code would be of the highest practical value"[4]. At any rate, the matter is outwith the purview of this thesis and as such I wish to express no particular opinion, except that this is a matter that deserves some thorough consideration.

The other matter I would like to consider now is one to which I made some allusion at the beginning of this thesis, which is with regards to the rules of similar facts and character evidence with special reference to non-jury trials.

Nigeria, for example, as earlier pointed out, operates by and large on a non-jury trial system. However, as we have seen throughout the discussion, the Nigerian law on this subject generally coincides with English common law. No serious attempt has been made in the local case law to depart from the English rules and reliance on English precedents is accepted as a matter of course. It has been argued that this automatic absorption of a set of hard and fast technical

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1) See the American Model Code; See also American Federal Rules of Evidence 2) See Draft Bill annexed to the 11th Report - Criminal Law Revision Committee; 3) "The Work of the Scottish Law Commission, 1972-73" (1974) S.L.T. (News) 149 4) Draft Code, Introduction, P.1

rules is regrettable largely because it is argued, that the rules of exclusion is not suited to the Nigerian system and other non-jury systems for that matter. The rules close relationship to the jury system and the desire to withhold doubtful evidence from the jurors do not obtain in Nigeria, where a professional judge alone sits in trial - which is the general practice in all non-jury systems. And this is how the situation was described: "(A)fter we have thus prepared the judge and trained him, after he has been selected and found worthy of his office, we do not trust him, his education, or his ability to draw distinctions. Instead we make him close his eyes and forbid him to listen lest he see and lest he hear unscreened and unreliable evidence and possibly use it as the basis for the judgement. It is like having a driver successfully pass all his driver's and mechanic's test, but in the end, out of fear of a traffic accident, giving him a horse to pull his car and forbidding him to use his motor."[1]

The general argument is that the judge is neither inept nor careless to such a degree that he needs protection; and if he is either, such a protection will hardly be of any help.[2] It is further argued that in any case , modern mass media will often bring the defendant's past to public notice wherever public interest is aroused and notwithstanding sub judice restrictions, and the point then is that, is it realistic to assume that such information will not reach the judge?, and if so, is it any more reliable than evidence introduced

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1) See the introduction to the Isreali Evidence Bill, P.II
2) See Morgan, Forward to the American Model Code, P.8

by a litigant and subject to examination? In fairness it is true to say that this factor is of much greater significance in the United States, and one may say that it is this perhaps which has influenced the liberalisation of the rule in that country, as the media there is so influential.

The other side of the coin may be even more important. A basic feature of the jury system is the rule that the judge determines the questions of admissibility while the jury makes the findings of fact. If therefore it is proper, to prevent any doubtful material reaching the triers of facts, at least such contact is prevented by the exclusionary rule. But in a non-jury system, evidence is proposed to the judge himself. If the opponent objects, an incidental issue is raised, to decide which the judge may have to examine the evidence, and he may reject it, in case it may prejudice him; but it has been strongly argued that once the judge has been "contaminated" by the improper evidence, it is simply ostrich policy to ignore the harm that has already been done, and excluding the evidence altogether would prevent its being properly weighted probatively. It is worth pointing out that even where there is no need to examine the evidence itself, or where it is on the face of it admissible and immediately rejected, it goes without saying that the very fact of objecting may be tactically harmful[1]. It should be realised however, that the main risk in admitting similar facts and character evidence is undoubtedly the prejudicial impact and this at least is closely connected with the jury system. But one must bear in mind that a legal system which

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1) Cf Morgan, Foreward to the Model Code, P.6

allows this kinds of evidence (i.e., similar facts and character evidence) is not necessarily primitive and that, afterall, it is done in most of the civilized countries.[1]

A common objection to similar facts and character evidence is that the inference therefrom is uncertain, but the same applies to almost any evidence, especially circumstantial. Moreover, the objection ignores the burden of proof which in civil cases rests on the balance of probabilities[2] and, in criminal cases, on the mystic formula "beyond any reasonable doubt". Nothing less, but also nothing more, should, be demanded from, similar facts evidence: is it more justifiable to decide a case upon the sole burden of proof - a burden which is justified by purely practical reasons, is quite arbitrary and can hardly be expected to do justice to the litigants - while rejecting evidence of disposition and character, lest that evidence, though of undeniable probative merit, cause harm in certain situations?

The objection of possible surprise and unfairness to the litigant, compelled to defend his whole past against unexpected attack can be met by amending the rules of procedure. The problem is not specific to similar facts and character evidence and should find its solution in a wider framework[3]. Besides , evidence of things that occured in the distant past will usually have minor probative value and be disregarded on that count.

Still another objection is that evidence of similar facts may

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1) Stow, "Evidence of Similar Facts" (1922) 38 L.Q.R. 63 2) Cf Hart's Sarcastic criticism of the Law of Probability in "From Evidence of Proof" (1956) 132-134; L.Tribe "Trial by Mathematics: Precision and Ritual in the Legal Process" (1970-71) 84 Harv.L.R.1329; M Finkel-Stein & M. Failrey "The Continuing Debate over Mathematics in the Law of Evidence" (1970-71) 84 Harv.L.R.1810. 3) See Illinois Civil Practice Act (1933) §43 (4);

confuse the issues, complicate the case and unduly delay the proceedings. The plain answer is that one who has been present in a courtroom will realise that almost any objection to the admission of evidence complicates litigation and wastes time, particularly so when conflicting authorities are cited (and in Anglo-American practice no party will fail to rely on some appropriate authority).

Still no one will deny that the dangers are real; all one is trying to do is show that they are not limited to this kind of evidence. The best solution, therefore, is not general exclusion, but reliance on the judge to reject evidence when the risks involved outweighs its probative value. Incidentally, judicial discretion may operate either way. It may be used to admit evidence which would otherwise be admissible: the fact that a piece of evidence happens to fall within or without somewhat arbitrary boundaries of one of the traditional exceptions does not conclusively prove or disprove its admissibility. To sum up, it is thought that the exclusionary rule, developed against a different legal background and due in great part to the circumstances prevailing elsewhere is unsuitable to the legal system of another operating a different system. The absence of jury trial it is thought commands that non-jury countries should seek their solutions instead of blindly immitating those systems, especially where the situations are no more than the result of historical accident. And I would like to draw attention to the dictum of Jackson J., in Michelson v U.S.[1] when he said: "We concur in the general opinion of courts, textwriters and the profession that much

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1) 335 U.S. 469, 69 Supt. Ct. 213 (1948)

of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter-priviledge to the other."

Having completed the task of the restatement of the existing law and made some suggestions towards the reform of some aspects of the law, it is my hope that this thesis has, in Thayer's words, given "the Law of evidence a consistency, simplicity, and capacity for growth which would make it a far worthier instrument of justice than it is."[1]

I would like to end on a philosophical note indicated in a periodical far remote from law and procedure: "Beware of two types of persons: of one who says 'The system is old, therefore it is good', and of one who says, 'The system is new, therefore it is good.' A system is good only if it solves the problem and promotes the subject-matter considered."[2]

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1) A Preliminary Treaties On The Common Law at p.511
2) (1968) 87 Icarei Yisreal (Isreali Farmers)